No. 98-5864-CFH Title: Tommy David Strickler, Petitioner
v.
CAPITAL CASE Fred W. Greene, Warden

Docketed: September 1, 1998 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Sep 1 1998	Application (A98-186) for a stay of execution pending the filing and disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
	Sep 1 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 1, 1998)
	Sep 4 1998	Brief of respondent in opposition filed.
	Sep 9 1998	Reply brief of petitioner filed.
	Sep 10 1998	Application (A98-186) referred to the Court by the Chief Justice.
	Sep 14 1998	Application (A98-186) granted by the Court.
	Sep 14 1998	Record requested.
	Sep 16 1998	Record filed.
	Sep 18 1998	REDISTRIBUTED. September 28, 1998
	Sep 29 1998	Record filed.
	Oct 5 1998	Petition GRANTED. limited to the folliwng questions: (1) Whether the State violated Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. (2) If so, whether the State's nondisclosure of exculpatory evidence and the State's representation that its open file contained all Brady material establishes the requisite "cause" for failing to raise a Brady claim in state proceedings. (3) Whether petitioner was prejudiced by the nondisclosure. SET FOR ARGUMENT March 3, 1999.
		**********
	Oct 15 1998	Motion of petitioner for appointment of counsel filed.
	Oct 26 1998	DISTRIBUTED. October 30, 1998 (Page 25)
	Nov 2 1998	Motion for appointment of counsel GRANTED and it is ordered that Barbara L. Hartung, Esq., of Richmond, Virginia, is appointed to serve as counsel for the petitioner in this case.
	Nov 4 1998	Order extending time to file brief of petitioner on the merits until December 2, 1998.
	Nov 4 1998	Order extending time to file brief of respondent on the merits until January 11, 1999.
	Nov 23 1998	Order further extending time to file brief of petitioner on the merits until December 9, 1998.
	Nov 23 1998	Order further extending time to file brief of respondent on the merits until January 19, 1999.
	Dec 9 1998	Brief of petitioner Tommy David Strickler filed.
	Dec 9 1998	Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae filed.
	Dec 10 1998	Joint appendix filed.
	Dec 10 1998	*Joint appendix in two volumes.
	Jan 11 1999	Motion of National Association of Criminal Defense

2pp

No. 98-5864-CFH

Entry	Date	Proceedings and Orders
		Lawyers, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 19 1999	Brief of respondent Fred Greene, Warden filed.
	Jan 19 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jan 21 1999	LODGING consisting of ten copies of lower court documents submitted by counsel for the respondent received.
	Jan 22 1999	CIRCULATED.
	Feb 18 1999	Reply brief of petitioner Tommy Strickler filed.
	Feb 18 1999	LODGING consisting of three sets of a letter and copies of a related expert report cited in the reply brief submitted by counsel for the petitioner.
	Feb 22 1999	LODGING consisting of 20 copies of a newspaper article from the Richmond Times-Dispatch, Sunday, February 21,1999 submitted by counsel for the petitioner and distributed.
	Mar 3 1999	ARGUED.

98-5864

No. 97 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Supreme Court, U.S.
FILED
1998
OFFICE OF THE CLERK

TOMMY DAVID STRICKLER,

Petitioner-Appellant,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent-Appellee.

On Petition For A Writ of Certiorari To the
Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 16, 1998

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43 pp

CAPITAL CASE

QUESTION PRESENTED

Whether the government's duty under the Due Process Clause and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence to the defense is limited by a due diligence exception imposed on defense counsel. If so, is the due diligence exception applicable only to evidence readily available to the defense in a public forum.

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Appendix D Strickler v. Netherland, No. 3:95CV924 (E.D. Va. Oct. 15, 1997)

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No. 97 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TOMMY DAVID STRICKLER,
Petitioner-Appellant,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,
Respondent-Appellee.

On Petition For A Writ of Certiorari To the
Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI
Imminent Execution Scheduled
September 16, 1998

Tommy David Strickler ("Petitioner"), a Virginia capital inmate, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, reversing the district court's grant of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished and is reprinted at Appendix A. The unpublished opinions of the United States District Court for the Eastern District of Virginia, Richmond Division, appear at Appendices B, C, and D.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on June

17, 1998, and the petition for rehearing was denied on July 14, 1998. A motion to stay the mandate and for a stay of execution was denied on July 30, 1998. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide in relevant part:

> No person shall be . . . deprived of life liberty, or property, without due process of law [.]
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves portions of Virginia's capital and habeas statutes, see Va. Code Ann. sections 8.01-654.1-6, 18.2-31, 19.2-264.2, and Va. S. Ct. Rules 3A:11(b)(2) and 4:1(b)(5), reprinted in Appendix E.

STATEMENT OF THE CASE

On January 5, 1990, Leanne Whitlock disappeared along with the blue car she had borrowed from her boyfriend, John Dean. On January 13, 1990, her nude body was discovered in a wooded area in Augusta County, Virginia. She died from multiple head fractures.

A. Procedural History

i) The Trial and Sentence: Strickler was arrested on January 11, 1990, and, based on his possession of Dean's car, charged with grand larceny in neighboring Rockingham County. The prosecution was later transferred to Augusta County. On February 27, 1990, Strickler was indicted in the Circuit Court of Augusta County on one count of abduction and one count of

robbery. JA 20-23[1]. On April 23, 1990, he was indicted for the capital murder of Whitlock during the commission of "robbery, rape or abduction with the intent to extort money or a pecuniary benefit." JA 20. Va.Code sec. 18.2-31.

In June, 1990, Strickler was tried by a jury and convicted of capital murder, robbery, and abduction. JA 1278-80. The jury sentenced Strickler to death based on the two statutory aggravators--future dangerousness and vileness. Va.Code. sec. 19.2-264.2. The court imposed the death sentence on September 19, 1990, in addition to two life sentences for robbery and abduction.

A co-defendant, Ronald Henderson; was charged with the same offenses in separate indictments but had not been arrested prior to Strickler's trial. Henderson was apprehended after Strickler's conviction and was granted a change of venue. Henderson was tried in March, 1991, convicted of first degree murder, and sentenced to life. JA 1086.

ii) The Direct Appeal: The Virginia Supreme Court affirmed the conviction and sentence on direct appeal on April 19, 1991. Strickler v. Commonwealth, 404 S.E.2d 227 (Va. 1991). Petition for certiorari was denied. Strickler v. Virginia, 112 S. Ct. 386 (1991).

iii) The States Habeas Proceedings: Strickler filed a state habeas petition with the Circuit Court of Augusta County. JA 467-517. The court denied all motions for expert and investigative assistance and dismissed the petition without an evidentiary hearing in September, 1993. JA 638-41. The Virginia Supreme Court granted a limited appeal on trial counsel's failure to object to the defective jury instruction on capital murder. The instruction included a predicate offense--abduction with intent to defile--that did not by statute support a capital conviction. Finding no prejudice from counsel's performance, the Court affirmed the denial of the writ. Strickler v. Murray, 452 S.E.2d 648 (Va. 1995). Petition for a writ of certiorari was denied. Strickler v. Angelone, 116 S. Ct. 146

[1] "JA" refers to pages of the Joint Appendix filed in the United States Court of Appeals.

(1995).

iv) Federal District Court Proceedings: On May 20, 1996, Strickler filed an amended federal habeas petition in federal district court. JA 705-835. A motion to dismiss was filed in June, 1996. On December 10, 1996, the district court granted an evidentiary hearing on eight claims and dismissed the remainder. App. B; JA 944-74. On a motion for reconsideration, the district court dismissed five additional claims and reaffirmed the grant of a hearing on the claims of ineffective assistance of counsel, suppression of Brady material, and denial of due process and a fair trial on January 16, 1997. App. C; JA 990-94. Strickler conducted discovery in preparation for the hearing. Based on the evidence produced, Strickler moved for summary judgment on his Brady and fair trial claims. JA 995-1057. The Warden submitted a cross-motion for summary judgment alleging procedural default and opposed Strickler's motion on the merits. JA 1058-65. On October 15, 1997, the district court granted Strickler's motion for summary judgment on both claims and vacated his conviction and death sentence. App. D; JA 1233-56.

v) The Decision Of The Fourth Circuit Court Of Appeals: Respondent appealed to the United States Court of Appeals for the Fourth Circuit. That Court reversed the district court. Strickler v. Pruett, No. 97-29 (June 17, 1998). Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on July 14, 1998. App. A. His motion to stay the mandate and for a stay of execution was denied on July 30, 1998. App. A. Petitioner is scheduled to be executed on September 16, 1998.

B. FACTS OF THE CASE

i. The Relevant Trial Testimony

Anne Stoltzfus testified that she witnessed the abduction of Whitlock from the parking lot of a Harrisonburg shopping mall. On January 5, 1990, Stoltzfus went to the mall with her daughter.

JA 92. Around 6 p.m. she saw two men and a woman at the Music Land store. One of the men was "revved up" and impatient. JA 93. She described the physical features of the three and their clothing. JA 94-96. Stoltzfus left the store, saw the trio inside the mall, and spoke briefly to the woman. JA 96. Shortly thereafter, Stoltzfus and her daughter were in their car and stopped in the parking lot when a car came by. Stoltzfus described the driver, a black woman, as "a rich college kid," "beautiful," "well dressed," "happy," "singing" and "bright eyed." JA 99. Stoltzfus got a good look at her and identified the driver as Whitlock. JA 99-100.

Whitlock pulled in front of Stoltzfus and stopped for traffic. The "revved up" man from the music store, whom Stoltzfus later identified as Strickler, came out of the mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. JA 102-03. The second man, later identified as Henderson, and the blonde woman, seen earlier in the mall, tried to enter the car. Whitlock accelerated and "laid on the horn." JA 103. Strickler hit Whitlock repeatedly on her shoulder and head. The car stopped, Strickler opened the passenger door, and the other two got into the back seat. JA 103. The Henderson handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time." JA 104. Whitlock was "totally frozen." JA 104.

Stoltzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from me." JA 105. Stoltzfus returned to her car, faced Whitlock, and then asked her three times "Are you O.K." Each time Whitlock looked at Stoltzfus and then looked down to her right. JA 105. Whitlock mouthed a word that Stoltzfus did not understand. She then realized Whitlock had said "help." JA 106. Stoltzfus pulled away and told her daughter to go inside the mall and get mall security. The daughter refused. JA 106. Whitlock drove past Stoltzfus very

slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." JA 107. Stoltzfus told her daughter to write the license number on an index card. Stoltzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243." JA 108. Whitlock drove off onto Route 33. Stoltzfus went home and never called the police. JA 109-110. At trial, she identified police photographs of the blue car Whitlock had been driving. JA 108.

The prosecutor argued that Stoltzfus' testimony established Strickler's commission of abduction and armed robbery, predicates to capital murder. JA 438-39. Stoltzfus repeated her testimony at Henderson's trial several months later.

Although Stoltzfus claimed to have witnessed this dramatic event, she never contacted the police despite massive media coverage of Whitlock's disappearance, the discovery of her body, Strickler's arrest, and an interstate search for Henderson. Based on a tip, Stoltzfus was first interviewed two weeks after Whitlock's disappearance by Det. Claytor of the Harrisonburg police. Claytor prepared notes and reports of his interviews. In addition, Stoltzfus sent Claytor letters and notes she prepared after meeting with Claytor. JA 1010-11. Throughout state court proceedings, these documents were never disclosed but were held in the Harrisonburg police files. As detailed below, they contained exculpatory and impeachment material.[2] Stoltzfus refused to meet with Strickler's investigator before trial. JA 1195-96. Her trial testimony contained no hint that she had given contradictory statements to the police.

ii) The Stoltzfus Materials

Stoltzfus' statements and writings to Claytor contradicted her trial testimony in material respects.

---

[2] The documents were discovered by federal habeas counsel in 1996 pursuant to an Order of the district court permitting counsel to examine and copy all police and prosecution files. A change in state habeas law barred Strickler from presenting his Brady claim to the state court. Va. Code sec. 8.01-654.1.

a) Exhibit 1 is a one page document containing Claytor's handwritten notes of his initial January 19, 1990 interview with Stoltzfus. JA 1031. The notes read in part:

Can't ID B/F
1st W/M
Can ID W/F 5'05" - 140 (little overweight) Blue Jean
brown shoulder Plain Face (Pail)
2d W/M Tall - Dark Hair
Cream Jacket

In her trial testimony, Stoltzfus contradicted her initial account to Claytor stating: "I gave detailed descriptions of the three persons[.]" JA 118. Yet in her initial interview she could not identify Strickler, describe him or his clothing, or describe the black female. At trial, she also described the black female in detail. At trial, she could not identify the white female. JA 120. Stoltzfus's trial description of the second white male was radically expanded and embellished. JA 93-94.

b) Exhibit 2 is a six page, typed report of Claytor's interviews with Stoltzfus. JA 1033-38. The report of interviews on January 19 and 22, omitted the statement in Exhibit 1 that Stoltzfus could not identify the black female and the first white male. It indicated Stoltzfus was "not sure" if she could identify the two white males but that she could identify the white female. JA 1035. At trial, she testified that she was "one hundred percent sure" of her identification of Strickler. JA 117. She testified that she "picked [the] two [men] with absolute certainty and the third [person] with a slight reservation." JA 117. The report contained no description of the clothing of the black female or of the first white male and stated only that the second white male had a cream colored jacket.

Contrary to her trial testimony and Exhibit 1, Stoltzfus claimed she might have seen the same white female and one white male inside the mall before the abduction, but said nothing about an encounter with the blonde woman and two white males in the music store. Stoltzfus did not recall the license number of the car, saying only that it was dark blue with West Virginia tags. When

shown photo spreads by Claytor, Stoltzfus had stated only that Strickler and Henderson "resembled" the men she saw.

Exhibit 2 also stated that Stoltzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. JA 1037. The next day, Stoltzfus advised the police that she now recalled the license number, NKA-243, and "had made up a quote to help remember the license number after the incident, 'No Kids After 2-43.'" Stoltzfus also told Claytor that although her daughter had been with her at the mall, the daughter did not see anything. JA 1035.

c) Exhibit 3 entitled "Observations" with diagrams of the abduction was given to Claytor by Stoltzfus on January 19, 1990 at 1 p.m. JA 1040-41, 1186. She did not describe the black female, her clothing, or the first white male other than "scroungy bum-type, W.Va. hick with long scraggly blondish hair." Stoltzfus described a dark blue, new sports car with West Virginia tags but gave no license number. She said nothing about the black female mouthing the words "help" or any suggestion that the first white male had a weapon. Stoltzfus did not report that she got out of her vehicle to speak to Whitlock.

d) Exhibit 4 is a typed letter, dated January 22, 1990, to Claytor and signed by Stoltzfus. JA 1043-45. The letter contradicted her subsequent trial testimony. Stoltzfus stated that she initially had no memory of being at the mall on the night of Whitlock's disappearance:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory. [JA 1043].

Her "memories" were based on her daughter's recollections. Stoltzfus related her visit to the record store in the mall but omitted any mention of the encounter with Strickler, Henderson, and the unidentified blonde woman that she testified to at trial. JA 1044. The letter contains no description

of the features or clothing of the black female, the two white males, or the unidentified white female.

Stoltzfus admitted that she was not certain the man she saw inside the mall with the white female was the same man who later forced his way into the victim's car. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?
>
> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there. [JA 1045].

Stoltzfus did not report the car's license number or her trick for remembering it. Exhibit 4 contained both exculpatory and impeachment material that was not contained in any other document.

e) Exhibit 5 is an undated, typed document entitled "Notes for Det. Claytor: My Impressions of The Car (Anne Stoltzfus)." JA 1047. This document contained no information about the license plate or license number. The car was described as "dark blue(navy) and shiny," American, and "about the size of a Buick Skyhawk." It was no longer a sports car. Stoltzfus "think[s] it was a two-door" but was not sure.

f) Exhibit 6 is a handwritten note to Det. Claytor from Anne Stoltzfus dated 1-25-90, 1:45 a.m. JA 1049. Stoltzfus reported that she spent "several hours" with Whitlock's boyfriend viewing photographs of Whitlock and was now certain Whitlock was the black girl Stoltzfus saw on January 5, 1990. Her identification and description at trial were probably based on these photographs and not on any "memory" of January 5, 1990.

g) Exhibit 7 is a typed letter (2 pages) dated January 26, 1990, to Det. Claytor and signed

by Anne Stoltzfus. JA 1051-52. This letter contained Stoltzfus's first description of the encounter with the two white males and the unidentified female at the music store and her first description of the clothing of the first white male. Stoltzfus reported that six to eight people in the mall and a couple people in the parking lot witnessed Whitlock's abduction. The letter concludes:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make. [JA 1052.]

The January 26, 1990, letter directly contradicted the January 22, 1990 letter and was inconsistent with the contents of her initial interviews with Claytor. The letter graphically demonstrated how her testimony evolved into that given at Strickler's trial.

h) Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus entitled "Details of Encounter With Mountain Man, Shy Guy & Blonde Girl." JA 1054-56. This document expanded on the January 26th letter and contained additional details that were ultimately included in Stoltzfus's trial testimony. Stoltzfus reported that once everyone was in Whitlock's car, the second white male transferred his coat to the first white male who was seated next to Whitlock and he "fooled with it for a while." For the first time, Stoltzfus claimed she got out of her car and walked over to Whitlock's car to speak with her. For the first time, Stoltzfus reported that her daughter wrote the West Virginia license number, NKA-243, on a card that Stoltzfus later threw away. For the first time, Stoltzfus reported that Whitlock directed her eyes towards her side on three occasions, and Stoltzfus wondered if there was a gun or knife held to her side. Stoltzfus reported seeing a picture of the car in the newspaper after learning of Whitlock's disappearance but claimed that she had not associated these facts with the events she witnessed. At trial, she denied seeing any news accounts of Whitlock's disappearance. JA 114, 119.

iii) The State's Failure To Disclose Under Brady

Strickler, and later Henderson, were prosecuted by the Augusta County Commonwealth's Attorney, Lee Ervin. Ervin had an "open file" policy. Defense counsel for both Strickler and Henderson reviewed Ervin's files. The Stoltzfus materials were not in Ervin's files when counsel reviewed the files prior to the June, 1990, and March, 1991, trials. JA 1023-29; 1086-89. Counsels' cross examination of Stoltzfus at Strickler's trial, and later Henderson's, did not employ any of the Stoltzfus materials. JA 110-26; 1138-50. Counsel would have used these materials to impeach Stoltzfus if they had been available. JA 1024, 1088.

The prosecutor, Ervin, admitted during federal habeas discovery that he had never seen five of the documents. He did have three of the documents prior to the two trials. Ervin believed the three documents (exhibits 2, 7, and 8) had been in his "open" file for counsels' examination and copying. JA 1190-93.

In state habeas, Strickler argued in part that his counsel had been ineffective for failing to make a formal, pretrial Brady motion. JA 472. The Commonwealth responded that all Brady materials had been in the prosecutor's "open file" and that counsel had been given everything Brady required:

> From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed a[l] [sic] the evidence the Commonwealth intended to present . . . Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.
>
> * * *
>
> Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can [Strickler] show prejudice.

JA 542-43 (emphasis added). In state habeas, the Warden also submitted the sworn affidavit of Strickler's trial counsel, Bobbitt and Roberts, who stated that "the prosecutor's office . . . gave us

full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files[.]" JA 611. Thus, the Warden persuaded the state habeas court to deny a hearing on the ineffectiveness claim, where the documents might have been disclosed, based on the representation that all Brady material had been provided to trial counsel and a pretrial Brady motion was unnecessary.

As Strickler had no access to or knowledge of the Stoltzfus materials, he did not present any state habeas claim based on their suppression. Strickler had moved for the appointment of an investigator and various experts to assist in the development of his state habeas petition. JA 624. The Commonwealth opposed these motions arguing that there was no right to such assistance in state habeas. JA 627-35. The petition and all motions were denied without a hearing. JA 638-41.

iv) The District Court Grants The Writ

In federal habeas, Strickler alleged for the first time that his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated by the state's suppression of the Stoltzfus materials. JA 787. The district court held that Strickler had demonstrated cause for his failure to raise the claim in state court. App. B at 23-24. The district court found that Strickler "had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings." App. C at 4.

The district court found that five documents (exhibits 1, 3, 4, 5, and 6) were never disclosed to defense counsel or to the prosecutor[3]. App. D at 18-19. These documents remained in a nonpublic file of the Harrisonburg police throughout state court proceedings. Id. at 16-17. The prosecutor had an open file policy during both Strickler's and Henderson's trials and defense counsel

[3] The district court concluded that it need not resolve the dispute concerning exhibits 2, 7 and 8, where the failure to disclose the remaining five documents constituted a Brady violation. JA 1244.

had "full access" to that file. Claytor recalled distributing only exhibit 2 to the Rockingham prosecutor and had no recollection of distributing any of the other documents. Id. at 18. In view of these facts, the district court found that the recollections of Strickler's co-counsel, Roberts, concerning possible knowledge of the contents of Stoltzfus' documents were "much too vague and insufficient to create a genuine dispute" about the disclosure of these five documents. Id. at 20. The district court also found that a newspaper story on June 17, 1990, containing a pretrial interview with Stoltzfus "contain[ed] virtually none of the information contained in the Stoltzfus materials[.]" Id. at 21. The district court found that the Warden had "not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation." Id. The district court found that the prosecutor was on notice that several separate police departments and jurisdictions had investigated the Whitlock murder and that relevant materials might be contained in their files. As a result of the state's actions, the five Stoltzfus documents were never disclosed to Strickler. These factual findings are not clearly erroneous.

The district court found that the Stoltzfus materials contradicted or impeached the witness's trial testimony "in many crucial respects." Id. at 6. The court concluded that the documents taken as a whole provided "potentially devastating impeachment material, casting doubt on her testimony." Id. at 11. The Commonwealth had argued at trial that Stoltzfus, the only eyewitness, established both the abduction and armed robbery predicates for the capital murder count. The district court held that the documents were material under Brady and rejected the Warden's argument that Stoltzfus' testimony was irrelevant to Strickler's conviction. Id. at 11-15. The district court granted Strickler's motion for summary judgment on the Brady claim and the denial of a fair trial claim, vacating his conviction and sentence. The Warden appealed.

v) The Court Of Appeals Reverses

The Court of Appeals excused the prosecutor's failure to disclose the Stoltzfus materials first at the time of trial and later during the state habeas proceedings. The Court held that Strickler had procedurally defaulted the claim when he had failed to file a discovery motion in state habeas for production of the Harrisonburg police files, citing Va.S.Ct. Rule 4:1(b)(5).[4] Because state habeas counsel did not exercise the "reasonable diligence" required under Brady, Strickler "cannot establish cause [to excuse default] based upon the unavailability of the Brady claim." App. A at 13, 21-22. The Court also rejected Strickler's argument that trial counsel was constitutionally ineffective when he failed to make a Brady motion at trial, thus demonstrating cause. Given the prosecutor's open file policy, "trial counsel were under no obligation to file a Brady motion." Id. at 23. Finally, the Court concluded that the documents were not "material" because there was no "'reasonable probability' of a different result" if they had been disclosed. Id. at 23-24.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision conflicts with that of every other Circuit Court of Appeals, decides important federal questions in ways contrary to decisions of this Court, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Strickler presents the classic Brady scenario--material impeaching a key prosecution witness held in privileged, undisclosed police files. The Fourth Circuit's decision limiting the State's obligation to disclose exculpatory evidence to those circumstances in which the defense could not have obtained the evidence itself, under any scenario, is irreconcilable with this Court's recent

[4] The State did not rely on this Rule in the district court or on appeal. The Rule was raised by the Fourth Circuit sua sponte in its decision.

restatement of established law in Kyles v. Whitley, 115 S. Ct. 1555 (1995). The Court below has abandoned the principle that prosecutors should be encouraged to disclose favorable evidence, thereby "preserving the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations [citation omitted]," id. at 1568, in favor of a rule that insulates prosecutors from the consequences of their decisions to suppress evidence provided some method by which the evidence might have been obtained by the defense can be constructed.

In adopting this rule, the Fourth Circuit decided a question that has split the Circuits--whether there is a "due diligence" exception to Brady--in a way that goes far beyond the limits imposed by any Circuit that recognizes the exception.

I. THE FOURTH CIRCUIT'S "DUE DILIGENCE" EXCEPTION TO THE STATE'S DUTY UNDER THE DUE PROCESS CLAUSE TO DISCLOSE EXCULPATORY EVIDENCE, BASED ON UNSUPPORTED SPECULATION THAT THE STATE HABEAS COURT MIGHT HAVE ORDERED DISCLOSURE OF PRIVILEGED POLICE DOCUMENTS UNKNOWN TO AND UNAVAILABLE TO THE DEFENSE, CONFLICTS WITH THE DECISIONS OF EVERY OTHER CIRCUIT AND WITH THIS COURT'S DECISIONS.

The Courts of Appeal in nine circuits have held that a "due diligence" exception exists to the State's obligation under the Due Process Clause to disclose exculpatory evidence to a criminal defendant. Each of those Circuits, except the Fourth Circuit, has limited that exception to cases in which the evidence was known by or fully available to the defense or in which the defense actually had all the information needed to produce the evidence itself. See Lugo v. Munox, 682 F.2d 7, 9-10 (1st Cir. 1982); United States v. Payne, 63 F.3d 1200, 1208-09 (2d Cir. 1995); United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991); Westley v. Johnson, 83 F.3d 714, 725-26 (5th Cir. 1996); United States v. Todd, 920 F. 399, 405 (6th Cir. 1990); United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996); United States v. Davis, 785 F.2d 610, 618 (8th Cir. 1986); United States v. Brown, 562 F.2d 1144, 1151 (9th Cir. 1977); United States v. Valera, 845 F.2d 923, 927-

28 (11th Cir. 1988).

Two Courts of Appeals, the D.C. and Tenth Circuits, have explicitly rejected the idea of any such exception. Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995); United States v. Agurs, 510 F.2d 1249, 1253 (D.C. Cir. 1975)(*citing*, Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966)), *rev'd on other grds*, 427 U.S. 97. Two other Circuits, the Seventh and the Ninth, have conceded the logic of that position, while adopting a highly restrictive rule of "diligence" to avoid blatant "gamesmanship" by defendants. United States v. Hedgeman, 564 F.2d 763, 768 (7th Cir. 1977); United States v. Shelton, 588 F.2d 1242, 1250 (9th Cir. 1978). In reality, there is little difference in the positions of these two Circuits and of the D.C. and Tenth Circuits. Based upon the resulting lack of materiality, the Tenth Circuit has also held that no constitutional violation occurs where the defense actually has the evidence. *Compare*, Banks, 54 F.3d at 1517, *with* United States v. Davis, *supra*, and United States v. Brown, *supra*. Thus, eleven Circuits have addressed an important constitutional issue with significantly varied results.

Petitioner urges that certiorari should be granted for three independent reasons. First, the adoption of a "diligence" exception by a majority of the Courts of Appeals is fundamentally inconsistent with this Court's Brady jurisprudence. Second, the breadth of the exception adopted in this case by the Fourth Circuit is without precedent. Third, contrary to the decision below, the burden of demonstrating the applicability of any such exception must fall on the government.

A. There Is No "Due Diligence" Exception To The State's Duty To Disclose Exculpatory Evidence.

The decision in this case effectively destroys a constitutional right that seemed long settled. Although this Court in Kyles v. Whitley, 115 S. Ct. 1555 (1995), provided a comprehensive review of the applicable law, it made no mention of a "due diligence" exception. According to Kyles, if the evidence is exculpatory and material, it must be disclosed. Id. at 1565.

> Bagley held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Id. (emphasis added), *quoting*, United States v. Bagley, 473 U.S. 667, 682. In each of its cases, this Court has set forth the rule in unambiguous terms, *e.g.*, Brady, 373 U.S. at 87; Bagley, 473 U.S. at 669, *quoting*, Brady, *supra*, further addressing only the question of what, if any, action by the defendant is required to trigger the State's obligation and clarifying the definition of materiality. *See, discussion*, Kyles, 115 S.Ct. at 1565.

None of this Court's decisions has said, much less held, that the prosecution's duty is affected by the prospect that the defense might be able to find the evidence itself.[5] As the Tenth Circuit held:

> ... the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, "[i]f the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made." Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 826 (10th Cir. 1995); Bagley, 473 U.S. at 682[] (Blackmun, J.); id. at 685[] (White, J.). In this case, the fact that defense counsel "knew or should have known" about the Dean/Hicks information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was "exculpatory."

Banks, 54 F.3d at 1517 (emphasis added).

Only the First Circuit has even attempted to ground the "due diligence" exception in this Court's jurisprudence, citing language in United States v. Agurs, 427 U.S. 97, 111 (1976). See Lugo, 682 F.2d at 9-10. That Court's reliance on Agurs, however, was clearly misplaced.

In Agurs, this Court noted that the standard for Brady claims differs from that for newly

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[5] In Agurs, 427 U.S. at 102, the Court did note that the Court of Appeals "found no lack of diligence on the part of the defense ...." It did not comment on this further, however, and the issue of defense diligence played no role in its decision.

discovered evidence claims, because, in the former, "the evidence was available to the prosecutor and not submitted to the defense," while in the latter it was to be "found in a neutral source." 427 U.S. at 111 (emphasis added). By losing sight of its context, the First Circuit erroneously focused only on the reference to evidence which is to be "found in a neutral source." In fact, the Agurs Court was distinguishing cases in which the prosecution does possess the information, in which event Brady applies, from those in which the prosecution does not possesses the information and the defendant "found [it] in a neutral source," in which case the standard for newly discovered evidence applies. Id. at 111-12. Thus, the significance of the distinction was that the evidence was known by the prosecutor, in the first instance, but was known by neither party in the second, not simply that it was "found in a neutral source" irrespective of the prosecutor's knowledge. This Court, after all did not say that Brady applied where the evidence "was not available to the defense," but where it was not "submitted to the defense."

It is clear, therefore, that this Court in Agurs never intended to create an exception to the prosecution's duty of disclosure. Indeed, while it has refused to abandon the "due diligence" requirement altogether, the Ninth Circuit, like the Seventh, has correctly recognized that the proposition that there should be no such requirement in the Brady context "draws some support" from Agurs. Shelton, 588 F.2d at 1250. *Accord*, Hedgeman, 564 F.2d at 768.

The putative "due diligence" exception, which negates the duty to disclose exculpatory evidence when such evidence is otherwise "available" to the defense, is, at its core, inconsistent with the logic, principles and resolutions of this Court's Brady jurisprudence. In Bagley, the Court noted that:

> [A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.

473 U.S. at 682. The Court also indicated that defense counsel could reasonably rely on such

nondisclosure for "pretrial and trial decisions on the basis of [the] assumption" that such evidence does not exist. Rather than concluding that the failure of defense counsel to investigate further or to make further discovery motions absolved the government of responsibility for its nondisclosure, as the Fourth Circuit's decision in Strickler plainly does, the Court actually noted that the government's sin would be that much greater, as it would be responsible for 'impairing' the defense by misleading it. Id. at 682-83. *Cf.* Wood v. Bartholomew, 116 S.Ct. 7 (1995)(no violation where defense counsel testified he would not have used the evidence in any event). Strickler's counsel was misled both at trial and in state habeas by the Commonwealth's representations that all Brady material had been disclosed to the defense in the prosecutor's open file.

In Moore v. Illinois, 408 U.S. 786 (1972), the defense complained that the prosecution did not provide the out of court statement of a witness to the police, although the defense had not asked the witness about the existence of such a statement. The defense asked two other witnesses about the existence of such statements and was provided the statements by the prosecutor. While the Court ultimately held that the undisclosed statement was not material, it did not suggest that the failure of defense counsel to inquire about it negated any duty to disclose that would otherwise have existed, even though the statements of the other witnesses had been produced in response to defense inquiry. Id. at 794-97.

The "due diligence" exception is also, as a practical matter, fundamentally inconsistent with the analysis applicable to such claims. In Kyles, the Court held that the materiality of the evidence and, thus, the duty to disclose, must be considered collectively. 115 S.Ct. at 1567.

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

Id. If the due diligence exception exists, the prosecution, in determining what it must disclose, must

also be "assigned the ... responsibility" to take into account what portion of that evidence defense counsel could find himself. This would add a new and particularly speculative element to the government's calculus, enabling the prosecutor, and ultimately requiring a reviewing court, to first identify which items of evidence counsel could have found -- by whatever standard that is to be judged -- and then to analyze the collective impact of only that evidence which counsel could not have found.

This exercise would be largely impossible for the prosecutor to perform, particularly when, as here, the exception is unlimited in its potential application. The prosecutor does not know what efforts counsel has made to locate the evidence, whether witnesses have refused or failed to divulge the information known to the prosecution (as happened here), or whether other obstacles have prevented counsel from discovering the evidence he seeks. Yet without such knowledge, the prosecutor can not assess the scope of his constitutional obligation. Thus, the "due diligence" exception adds a particularly troublesome layer of uncertainty to the Brady equation; the prosecutor must judge not only whether the evidence is "favorable," Kyles, 115 S.Ct. at 1568, but, if so, whether counsel is chargeable with its discovery.

The "due diligence" exception subverts the essential premise of Kyles and its precursors that the duty to disclose favorable evidence

> serve[s] to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 [] (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. [Cite omitted].

Kyles, 115 S.Ct. at 1568. The exception accomplishes exactly what the Court warned against in Kyles, but to a degree not even contemplated there: the descent of the "adversary system of prosecution ... to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of

truth." 115 S.Ct. at 1568.

It certainly accomplished that here. The prosecutor was responsible for production of the Stoltzfus documents even though he had no personal knowledge of five of the eight documents. However, the prosecutor knew other jurisdictions had been involved in the investigation. JA 1255. A prosecutor cannot insulate himself from material that might prove detrimental to his case. "[The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles at 1567. The prosecutor's good faith or bad faith in failing to reveal exculpatory or impeachment material is irrelevant. Id. See Smith v. Secretary Dept. of Corrections, 50 F.3d 801 (10th Cir.), cert. denied, 116 S. Ct. 272 (1995)(granting the writ based on a Brady violation where two counties conducted murder investigation, prosecutor had an "open file," but critical material from one county was not therein). Moreover, the prosecutor affirmatively represented to the defense that all Brady material was contained in the "open file," and in state habeas, the Commonwealth repeated that representation.

Nevertheless, the Commonwealth's wrongful conduct has been excused, and Strickler is to be executed, because the Court of Appeals has speculated that state habeas counsel should have filed a discovery motion for which he had no factual or legal basis and then further speculated that such a motion would have been granted, resulting in the production of the Stoltzfus documents.

B. The Standard Adopted By The Fourth Circuit By Which Due Diligence Must Be Assessed Is Incompatible With The Requirement Of Disclosure.

Assuming a "due diligence" exception to the duty of disclosure does exist, the Court of Appeals adopted in this case a novel standard that swallows the constitutional rule. The Court found that "the Brady claim was available to [Strickler] in state court through the exercise of reasonable diligence." App. A at 21-22. "Reasonable diligence" requires counsel to engage in a "fishing expedition" for privileged documents with no factual or legal basis to support his discovery motion

despite the state's repeated representation that all Brady material had been disclosed. The Court then assumes this motion would have been granted, although it can cite no authority in support, and would never have granted such a motion itself.

The standard adopted by the Fourth Circuit eliminates any incentive for disclosure, in plain conflict with the policies underlying this Court's decisions. In Kyles, the Court extolled the virtues of disclosure and adopted a standard designed to encourage "[t]he prudence of the careful prosecutor." 115 S.Ct. at 1569. The Fourth Circuit standard, on the other hand, offers virtual immunity to prosecutors, by shielding their decisions not to disclose exculpatory information, except where a defendant not only discovers the evidence post-trial and demonstrates its materiality, but also avoids a post-hoc reconstruction of how, in theory, his counsel might have been more diligent and might, if he were able to persuade a state court to permit a "fishing expedition" through privileged police and prosecution files, have discovered the evidence to which he was entitled all along. "A conviction obtained while defense counsel is ignorant of important potentially exculpatory evidence cannot be upheld merely because 'more able, diligent, or fortunate counsel might possibly have come upon the evidence on his own.'" Agurs, 510 F.2d at 1253, *quoting*, Levin, 363 F.2d at 291.

The facts in both Bagley and Kyles demonstrate the error in the Court of Appeals' holding. In Bagley, this Court found a due process violation based upon the failure to disclose a monetary inducement even though counsel "was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government." 473 U.S. at 678. The Court did not even suggest that the failure to inquire on the issue of bias excused the prosecutor's nondisclosure.

In Kyles, each witness was known to the defense, having testified at Kyles' first trial. Counsel plainly could have asked each whether he had given a statement to the police. Neither the

majority nor the dissent excused the State's failure to disclose prior inconsistent statements based upon counsel's failure to inquire about them, either pre-trial or during either of Kyles' trials. The Fourth Circuit, however, plainly would excuse the nondisclosure in Kyles based upon counsel's failure to inquire "diligently" as to these matters. The Fourth Circuit's decision is not only inconsistent with this Court's Brady jurisprudence, it is inconsistent with both the decisions of other circuits applying a "due diligence" exception and even its own prior decisions. In no other case has a Court of Appeals, including the Fourth Circuit until now, applied that exception when the prosecution represented both at trial and in state habeas that all Brady material had been disclosed to the defense through the prosecutor's "open file" and where the relevant witness's trial testimony contained no clue that interviews and materials contradicting her trial testimony had been given to the police.

Prior to the decision in Strickler's case, the Court recited fundamentally inconsistent standards for application of the "due diligence" exception. In Stockton v. Murray, 41 F.3d 920, 927 (1994), the Court held that there is no prosecutorial duty to disclose evidence where the defense "sit[s] idly by," rather than pursuing allegedly exculpatory information about which it actually knew -- a rule akin to that of the Second Circuit. Similarly, in United States v. Wilson, 901 F.2d 378, 381 (1990), the Court held that the duty to disclose does not exist "where the exculpatory evidence is not only available to the defendant but also lies in a source where a reasonable defendant would have looked...," (emphasis added), a standard by which the result in Strickler's case could not have been reached. Moreover, in United States v. Kelly 35 F.3d 929, 934-37 (1994), the Court found there was a due process violation where the prosecutor suppressed a letter written by a primary prosecution witness as well as a search warrant affidavit containing impeachment material about the same witness. The Court rejected the argument that the evidence was available to the defense with

reasonable diligence where it was held in nonpublic government files during the trial.

On the other hand, in Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995) and Epperly v. Booker, 997 F.2d 1 (4th Cir. 1993), the Court applied the exception somewhat more broadly than in Stockton and Wilson, and far more broadly than in Kelly, holding counsel in Barnes responsible for knowledge adduced at the trial of a co-defendant, 58 F.3d at 975-77 (*citing*, Lugo, *supra*), and, in Epperly, excusing the nondisclosure of procedures for the use of search dogs because they could have been obtained through discovery, independent expert testimony, or cross-examination of the government's expert. 997 F.2d at 9.

Until Strickler, the Fourth Circuit had held that a habeas petitioner failed to establish cause for default only if the undisclosed Brady material was available in the public forum. In Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996), a Virginia capital case, the Commonwealth failed to reveal police interviews with the victim's sexual partners, none of whom were trial witnesses and hence were unknown to the defense, concerning the victim's sexual practices. Police interviews with the victim's partners revealed that the victim's sexual practices were consistent with Hoke's account of his sexual encounter with the victim. The undisclosed interviews supported Hoke's defense, i.e., that the victim had suggested and voluntarily engaged in vaginal and anal sex. The Fourth Circuit excused the prosecutor's failure to disclose the exculpatory evidence gathered by the police because defense counsel failed to conduct "a reasonable and diligent" investigation. Defense counsel had made several unsuccessful efforts to locate the victim's sexual partners and was met with hostility and resistance. Nevertheless, the Court speculated that if Hoke's attorney had found and interviewed the same partners, they would have made the same admissions to him. Id. at 1355. Strickler goes well beyond the decision in Hoke. The Court had never before held that nonpublic, police documents were reasonably available to defense counsel, who had no clue as to their contents.

In contrast, the other Circuit Courts have limited application of the due diligence exception to cases in which the information is known by the defense, is contained in the public record, or could have been readily obtained from sources or witnesses known to the defense.[6] Each Court of

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[6] First Circuit: Lugo v. Munoz, *supra*, (no Brady violation as evidence was in the "public record," 882 F.2d at 9-10) [citing United States v. Sobien, 301 F.2d 236, 241-42 (2nd Cir. 1961), *cert. den.*, 82 S.Ct. 1585 (1962)(defendant had actual knowledge of evidence claimed to have not been disclosed)]. United States v. Hicks, 848 F.2d 1, 4 (1st Cir. 1988), described the holding in Lugo as the "government has no Brady burden when facts are readily available to the defense." (emphasis added). The government may fulfill its Brady obligation by identifying potentially exculpatory witnesses and informing the defendant of their role in the allegations, but if the defendant can not gain access to the witness, the government must provide evidence itself.

Second Circuit: The exception applies where the defendant had actual knowledge of the relevant witness and/or the essential facts, and simply failed to follow up on that information. *See* Williams v. United States, 503 F.2d 995, 998 (2nd Cir. 1974); United States v. Bermudez, 526 F.2d 89, 100 (2nd Cir. 1975); United States v. Esposito, 834 F.2d 272, 275-76 (1987). In Payne, supra, 63 F.3d at 1209, Brady violation found where defense was unaware of facts needed to discover an affidavit in the public record.

Third Circuit: Court refused to apply the exception in United States v. Perdomo, *supra*, and found a Brady violation based upon failure to disclose the criminal records of witness, although the Office of the Public Defender, which represented the defendant, had previously represented that witness. "[C]ounsel did not have knowledge, or more importantly, any responsibility to be aware of the witness' criminal record." 929 F.2d at 969. The Third Circuit held that the exception applies "if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." Id. at 973 (emphasis added).

Fifth Circuit: The Court has consistently applied the exception if the defense had full or equal access to the information. United States v. Ramirez, 810 F.2d 1338, 1343 (5th Cir. 1987); Williams v. Scott, 35 F.3d 159, 163 (5th Cir. 1994), *cert. den.*, 115 S.Ct. 959 (1995); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977); United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985); United States v. Milstead, 671 F.2d 950, 953 (5th Cir. 1982); United States v. Bi-Co Pavers, Inc. 741 F.2d 730, 736 (5th Cir. 1984). The applicable standard for analyzing the performance of defense in this context is whether counsel exercised "*any* reasonable diligence." United States v. Prior, *supra*; United States v. Bi-Co Pavers, Inc, *supra*.

Sixth Circuit: United States v. Todd, supra, 920 F.2d 399, 405 (no Brady violation when the defendant is made aware "of the essential facts that would enable him to take advantage of the exculpatory evidence").

Seventh Circuit: As noted earlier, the Court has applied the exception with great restraint. The Court found a Brady violation, and condemned the prosecutor's conduct as "indefensible," where he failed to disclose a witness' recantation of her inculpatory statements against the defendant, even though defense counsel had access to the witness and "knew full well what [she] was telling the prosecution all along,...." Mustread v. Gilmore, 966 F.2d 1148, 1152 (7th Cir. 1992). See United States v. White, 970 F.2d 328, 337 (7th Cir. 1992)(no duty of disclosure when the information is "fully available" to the defense); Morris, supra, 80 F.3d at 1169-70 (no Brady violation as defense actually possessed some of the disputed documents and had equal access to those documents in the possession of other government agencies).

Eighth Circuit: United States v. Davis, 785 F.2d 610, 618 (8th Cir. 1986)(no Brady violation when information contained in a medical report was actually in the defendant's possession and government need not explain the meaning of the report).

Appeals which has applied the "due diligence" exception, by whatever standard, except the Fourth Circuit, has limited it to circumstances where the Court could determine what counsel alone would have found had diligence been exercised, not, as here, what he might have found had a lower court intervened and granted a discovery motion for which there was no known factual or legal basis. Consequently, not in a single one of these cases, or in any other of which petitioner is aware, has a Court of Appeals excused the government's failure to disclose exculpatory evidence where, as here, the existence of the evidence was unknown to the defense, much less when, the government repeatedly represented that all such evidence had been produced.

However, in the Fourth Circuit, under the rule of this case, prosecutorial suppression of exculpatory evidence is to be accepted even when the defense could not have obtained the evidence through its own efforts and even when it is only theoretically possible that the defense could have obtained the evidence through court intervention. *Cf., e.g.*, Hicks, 848 F.2d at 4 (if defendant

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Ninth Circuit: In Shelton, *supra*, the Court acknowledged that Agurs lent support to the proposition that the due diligence exception should not apply to Brady claims. 588 F.2d at 1250. The Court, adopting a standard of "any reasonable diligence," concluded that there was no Brady violation because the witness and the value of his testimony were known to defense, and there was no indication that the defense had difficulty locating him. Id.

Tenth Circuit: The Court has categorically rejected any exception to the State's duty of disclosure based upon the asserted lack of diligence by the defense. Banks, supra, 54 F.3d at 1517.

Eleventh Circuit: Like the Fifth and Ninth Circuits, the Eleventh has adopted an "any reasonable diligence" standard. United States v. Meros, 886 F.2d 1304, 1309 (11th Cir. 1989); Valera, supra, 845 F.2d at 928, *citing* United States v. Prior, *supra*; Routly v. Singletary, 33 F.3d 1279, 1285 (11th Cir. 1994). In each case, nondisclosure was tolerated because the defense demonstrably would have found the evidence had it exercised even minimal effort, i.e., "*any* reasonable diligence." See also United States v. Spagnuolo, 960 F.2d 991, 994 (11th Cir. 1992)(Brady violation where "neither [defendant] nor his lawyer knew before trial about the favorable information in order to make an effort to obtain its production." Id. Thus, to excuse nondisclosure, the Eleventh Circuit requires that the defendant actually know about the exculpatory evidence and where to find it, unlike the Fourth Circuit.

District of Columbia Circuit: The Court, even before Brady, has rejected the notion that the duty of disclosure is limited by any defense obligation to exercise "due diligence." Levin, 363 F.2d at 291 Agurs, 510 F.2d at 1253; Marshall v. United States, 436 F.2d at 159 & n.11.

cannot gain access to witness, government must provide exculpatory evidence).

If there is to be a "due diligence" exception to the State's duty of disclosure, it must be limited to instances in which the information is actually known by the defense, or demonstrably *could* have been obtained from sources or witnesses known and available to the defense that counsel had specific reason to investigate. Nondisclosure should not be excused where, as here, counsel has unquestionably exercised "some diligence" in attempting to obtain the information. *See, e.g.*, Shelton, 588 F.2d at 1250; Prior, 546 F.2d at 1259 (5th Cir. 1977); Stockton v. Murray, *supra* (defendant can not "sit idly by"). Any other rule is simply inconsistent with the prosecution's underlying Due Process duty.

C. If The Exception Exists, The Burden Must Be On The State To Demonstrate That Counsel Would Necessarily Have Discovered The Exculpatory Evidence Through The Exercise Of Due Diligence.

Having extended the "due diligence" exception into state habeas, the Court of Appeals then imposed on petitioner the virtually impossible burden of proving the negative, i.e., that counsel could not have discovered the evidence.[7] The Fourth Circuit explained its reasoning as follows:

> On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a Brady motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all Brady material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stoltzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

Slip op. at 16. Based on the erroneous factual assumptions and incorrect legal conclusions incorporated in this passage, the Court concluded that Strickler had not demonstrated reasonable

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[7] The Eleventh Circuit also has placed the burden of disproving the possibility that the defense could have found the evidence on the defendant. *See, e.g.*, Meros, 886 F.2d at 1308; Spagnuolo, 960 F.2d at 994. No other circuit appears to have done so.

diligence and, therefore, cause for default in state court.

First, although Stoltzfus testified that she was interviewed by Claytor on several occasions, nothing in her trial testimony revealed that she had given contradictory and inconsistent statements about the events she had "witnessed." Strickler's trial counsel and his state habeas counsel had no notice that prior inconsistent or exculpatory statements existed that were discoverable under Brady but had not been disclosed. The Court's opinion does not disagree and does not point to anything in Stoltzfus' testimony that would have alerted Strickler's counsel to undisclosed impeachment material.

Second, as the Commonwealth affirmatively and erroneously represented that all Brady material had been disclosed through the prosecutor's "open file," Strickler's counsel had no factual basis to argue to the trial court or to the state habeas court that discoverable statements had not been disclosed. The Court's opinion does not disagree and does not point to anything in the state record that would have supported a discovery motion.

Third, under Brady, Bagley, and Kyles, the state has an affirmative obligation to disclose all favorable evidence in its possession, including exculpatory and impeachment evidence, even without a specific request by the defendant. This obligation does not end with the trial. Kyles at 1567-68; Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992)(Brady obligation continues throughout federal habeas proceedings); see also, Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976). The Fourth Circuit is shamefully silent both as to the Commonwealth's undisputed constitutional obligation and the Commonwealth's undisputed violation of this constitutional obligation.

Fourth, the converse of Brady is that the state has no obligation to disclose consistent, inculpatory witness statements in the exclusive possession of the state. Moreover, under Virginia law, disclosure of all witness statements to Commonwealth agents is prohibited unless those

statements constitute Brady material[5]. The opinion fails to acknowledge these state law prohibitions on disclosure of investigative and prosecution files.

Fifth, the Court opinion speculated that Strickler could have obtained copies of the Stoltzfus documents in the Harrisonburg police files by a motion to the state habeas court invoking Virginia Supreme Court Rule 4:1(b)(5). That rule states in relevant part:

> (5) Limitations on Discovery in Certain Proceedings. In any proceeding . . . (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus . . . without prior leave of the court, which may deny or limit discovery in any such proceeding.

The Court cited no Virginia case or authority to support its conclusion that Strickler would have been granted discovery of the police files if he had made such a motion given the facts of his case. In fact, the Commonwealth had never advanced this argument in the district court or on appeal. It was raised sua sponte by the Fourth Circuit, and Strickler had no opportunity to respond.

The Court erred in its interpretation of state Rule 4:1(b)(5). The police files were privileged and clearly exempt under the language of the Rule itself. See Howard v. Warden, 348 S.E.2d 211, 212 (Va. 1986)(noting circuit court decision that police department files are privileged and not open for examination even when state habeas petition alleges Brady violation and petitioner moves for discovery). Moreover, Strickler could not demonstrate "relevance" or "good cause" or any factual basis for a discovery motion since the Commonwealth repeatedly stated that all required disclosures had been made prior to trial. See Rakes v. Fulcher, 210 Va. 542, 172 S.E.2d 751 (1970)(good

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[5] Rule 3A:11(b)(2) of the Rules of the Supreme Court of Virginia specifically denies pretrial "discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal documents made by agents in connection with the investigation or prosecution of the case," except for the defendant's own statements and forensic reports. Virginia Code sections 15.2-1722 and 2.1-342(B)(1) prohibit disclosure of memoranda, correspondence, evidence, investigative reports, and complaints held in police files.

cause must be demonstrated for discovery). There is no right to discovery in state habeas. Yeatts v. Murray, 455 S.E.2d 18, 21 (Va. 1995). Thus, the Fourth Circuit erred in concluding that as a matter of Virginia state law the police files were available to Strickler through reasonable diligence.

The Court of Appeals effectively placed on Strickler the duty to prove that his counsel could not have obtained the evidence either by himself or through court intervention. This allocation of the burden of proof frustrates the purpose of Brady and its progeny, since it is always possible to hypothesize some method by which the evidence could have been uncovered. In theory, the defendant in most instances--though not in this case--could have done whatever the police did to discover the evidence. The policy considerations set forth in Kyles demand that, if the prosecutor chooses to "tack[] too close to the wind," 115 S.Ct. at 1568, by not disclosing exculpatory evidence on the theory that counsel might be able to discover it himself, the State should bear the burden of proving that counsel was constitutionally ineffective. The State must prove that counsel's failure to undertake the investigation required to uncover the evidence constituted ineffective assistance of counsel and that, had he not been ineffective, counsel would have discovered that evidence. *See*, Strickland v. Washington, 466 U.S. 668, 688 (1984).

Whatever the contours of the exception are, it is an affirmative defense of the State, not an element of the petitioner's claim, and the burden must be on the State to prove its applicability in any given case. Indeed, it is revealing that the Eleventh Circuit, the only other Circuit to clearly place the burden on petitioners in this context, has restated the elements of a Brady claim to be that the defendant must prove, in addition to possession of favorable evidence and its suppression by the government, and the materiality of that evidence, "that the defendant does not possess the evidence, nor could he obtain it himself with any reasonable diligence." Meros, 866 F.2d at 1308 (emphasis added). By contrast, this Court has stated that all that is required for such a claim is (1) that the

evidence be possessed and suppressed by the government, and (2) that it is material either to guilt or to punishment. Agurs, 427 U.S. at 104 n.10, 111; Kyles, 115 S.Ct. at 1565. Placing the burden of disproving the discoverability of the evidence on the petitioner, especially in combination with the level of diligence demanded by the Fourth Circuit (which is now higher than the standard applied by the Eleventh Circuit), and its willingness to speculate about the potential fruits of that diligence, dooms Brady and its progeny to oblivion.

In addition, the Fourth Circuit's decision conflicts with clear and long established decisions of this Court on procedural default. Cause excusing procedural default typically "requires a showing of some external impediment preventing counsel from constructing or raising the claim." Coleman v. Thompson, 501 U.S. 722, 753 (1991), quoting Murray v. Carrier, 477 U.S. 478, 488 (1986). This Court has held that interference by the state constitutes cause excusing a petitioner's failure to present a constitutional claim in state court. See Amadeo v. Zant, 486 U.S. 214, 222 (1988)(cause is present where evidence revealing violation "was concealed by county officials and therefore was not reasonably available to petitioner's lawyers"); Dobbs v. Zant, 113 S. Ct. 835, 836 (1993)(petitioner permitted to rely on transcript not previously discovered or asserted as basis for relief because "delay [in discovering transcript] resulted substantially from the State's own erroneous assertions that closing arguments had not been transcribed" and because petitioner properly relied on state's assertions). Strickler has demonstrated cause based on the state's uncontested, continuous suppression of the Stoltzfus documents throughout state court proceedings coupled with the state's repeated, erroneous representations that all Brady materials had been produced to Strickler's attorneys. The Fourth Circuit opinion obliterates the doctrine of cause excusing default and violates long established law.

D. The Suppressed Evidence And False Testimony Were Unquestionably Material And Required Affirmance Of The District Court Decision.

As an alternative ground for its decision, the Court of Appeals stated that the suppressed evidence was not material. This is a matter of law and, particularly in light of the other flaws in this capital case, should be reviewed here. *See*, Kyles, 115 S.Ct. at 1576 (Stevens, J., concurring). "In our view, the Stolzfus [sic] materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial. During either phase, Strickler never contested that he abducted and robbed Whitlock." App. A at 24. This was error for several reasons.

Strickler's capital murder conviction was based on the predicate offenses of abduction with intent to defile and armed robbery.[9] Stoltzfus provided the only eyewitness testimony to the abduction in the mall parking lot and the only testimony that Strickler was armed during that abduction. The Commonwealth argued on summation that Stoltzfus' testimony conclusively proved these two predicate offenses. JA. 432, 437-439. However, the Court incorrectly assumed that abduction and simple robbery were valid capital predicates. App. A at 24. They are not.

Stoltzfus' testimony was essential to the armed robbery predicate. The prosecutor argued that Strickler had a knife and that he held it against the victim as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. That was pressed right up against Leanne . . . Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence show it was him.

[9] Strickler was never charged with rape, and the prosecutor admitted that there was no proof Strickler had raped the victim. JA. 432.

Strickler was never indicted or arraigned on armed robbery as a predicate to capital murder. The indictment stated only robbery which was not a capital predicate. JA 24. The court sua sponte charged armed robbery but never instructed the jury on the elements of armed robbery. JA 428-29.

JA. 438-39 (emphasis added). However, in her very first statement to the police, Stoltzfus was unable to identify Strickler or provide any description of him or his clothing. JA 1031. Defense counsel could not challenge Stoltzfus because the police suppressed her prior inconsistent and contradictory statements. Strickler was deprived of an opportunity to effectively defend against the armed robbery predicate.

The remaining capital predicate was invalid. In state habeas, the Virginia Supreme Court held that Strickler's jury had been erroneously charged on abduction with intent to defile. Strickler v. Murray, 452 S.E.2d 648 (Va. 1995). The statute at the time of Strickler's trial applied only when the victim was under 12 years of age. Strickler's defense counsel was ineffective and failed to object to the jury instruction on the abduction predicate. However, the state habeas court upheld the conviction based on evidence of armed robbery. Yet all evidence of armed robbery came from Stoltzfus' testimony. Strickler was unable to defend against this charge because the Stoltzfus materials were suppressed.

The Fourth Circuit made no mention of the invalid abduction predicate and ignored the evidence of armed robbery based on Stoltzfus' testimony. As a result, the Court wrongly concluded that Strickler could not demonstrate prejudice. However, if Stoltzfus had been properly impeached based on her own prior statements, the jury would have had a reasonable doubt about both the armed robbery and the abduction. That doubt could have resulted in an acquittal on the capital murder charge and a conviction on a lesser offense, as occurred with Strickler's co-defendant at his separate trial. In Strickler's trial, the jury also had been charged on the lesser offense of first degree murder.

The Stoltzfus documents were material for another reason that was never addressed by the Fourth Circuit. Stoltzfus portrayed Strickler as the only one who committed violent acts against Whitlock. Stoltzfus said Strickler forced Whitlock's car door open and stuck her repeatedly on the

head and shoulder. Stoltzfus described Strickler as the revved up "Mountain Man" but portrayed Henderson as "Shy Guy," a passive follower. The prosecutor used Stoltzfus' testimony to argue that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. Without Stoltzfus' testimony the jurors would have been reduced to speculation about Strickler's participation in the crimes charged. It was not irrelevant to his conviction.

In addition, substantial evidence pointed to Henderson, rather than Strickler, as the one responsible for Whitlock's murder. On the night of the murder, Henderson told a friend he had killed an unidentified "nigger" and that friend saw blood on Henderson's clothes. JA 384. Henderson's wallet was found in the vicinity of Whitlock's body. JA 176-77. On the night of Whitlock's disappearance, Henderson (not Strickler) gave her watch to an woman in a bar. JA 157. Thus, successful impeachment of Stoltzfus would have created substantial doubt about Strickler's role and participation in Whitlock's murder. Defense counsel could have successfully focused his trial strategy on minimizing Strickler's involvement where substantial evidence had been presented against Henderson.

> This Court reiterated the established prejudice standard in Kyles, 115 S. Ct. at 1565:
>
> [F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

(Citing United States v. Bagley, 473 U.S. at 682, 685.) In Kyles the Supreme Court emphasized that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence could have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." Id. at 1566. Materiality is not a sufficiency of the evidence test, as the Fourth Circuit erroneously held. App. A at 24.

Strickler's trial was fundamentally unfair and unreliable. The suppressed evidence "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678. Disclosure of the Stoltzfus documents could have resulted in conviction of a noncapital, lesser offense.

CONCLUSION

For all the foregoing reasons, a petition for a writ of certiorari should be granted.

TOMMY DAVID STRICKLER

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August 31, 1998

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

A-186

(3)

No. 97-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Supreme Court, U.S.
FILED
SEP 1 1998
OFFICE OF THE CLERK

TOMMY DAVID STRICKLER,

Petitioner-Appellant,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent-Appellee.

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SUPREME COURT, U.S.

On Petition for a Writ of Certiorari to the Court Of Appeals For The Fourth Circuit

APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
September 16, 1998

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135 pp

APPLICATION FOR A STAY OF EXECUTION

Pursuant to Supreme Court Rule 23 and 28 U.S.C. sec. 2251, Petitioner Tommy David Strickler moves this Court for a stay of his execution, scheduled for September 16, 1998, pending this Court's disposition of his Petition for a Writ of Certiorari. Mr. Strickler is filing his Petition along with this Application.

Mr. Strickler requests a stay of execution from this Court based on the reasonable probability that four Members of this Court will consider the issues raised in Mr. Strickler's petition sufficiently meritorious for a grant of certiorari, the significant possibility that this Court will reverse the decision below and reinstate the district court decision granting the writ, and the irreparable harm that will occur if his execution is not stayed. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Mr. Strickler has already sought a stay of execution from the Court of Appeals for the Fourth Circuit. His application was denied on July 30, 1998.[1]

In his Petition, Mr. Strickler asks this Court to review one issue addressing the state's duty under the Due Process Clause and Brady v. Maryland 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence to the defense:

> Whether the government's duty under the Due Process Clause and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence is limited by a due diligence exception imposed on defense counsel. If so, is the due diligence exception applicable only to evidence readily available to the defense in a public forum.

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[1] A copy of the state court Order setting Mr. Strickler's execution date and a copy of the Fourth Circuit's Order denying a stay of execution are appended.

This case raises an issue of critical importance: namely, whether a due diligence exception to the prosecutor's disclosure obligations under Brady is fundamentally inconsistent with this Court's Brady jurisprudence. If such an exception exists, is it properly limited to that evidence known by or fully available to the defense or is it limited to those cases where the defense actually had all the information needed to produce the evidence itself. Nine circuits have recognized such an exception in limited circumstances. Two circuits have explicitly rejected any such exception.

In contrast, the Fourth Circuit has adopted a broad exception that swallows the constitutional rule. In Strickler v. Pruett, No. 97-29 (4th Cir. June 17, 1998), the Fourth Circuit excused the prosecutor's failure to disclose impeachment material on a key prosecution witness held in nonpublic, police files on the grounds that defense counsel failed to make a post-conviction discovery motion, even though defense counsel had no factual or legal basis for such a motion. The Court reached this result while ignoring the state's representations first at trial and then in post-conviction proceedings that all Brady material had been disclosed in the trial prosecutor's "open file." The decision in Strickler was not an aberration but was the logical extension of the Court's progressive retreat from Brady set out in Epperly v. Booker, 997 F.2d 1 (4th Cir. 1993), Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995), and Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996). Unlike those cases, however, the evidence in Strickler's case was

never available to defense counsel, and thus not discoverable, in any public forum.

The Fourth Circuit's decision is contrary to this Court's decisions in Brady, Kyles v. Whitley, 115 S. Ct. 1555 (1995), and United States v. Bagley, 473 U.S. 667 (1985). The decision of the Fourth Circuit conflicts sharply with the decisions of every other circuit interpreting Brady in light of any due diligence exception. It also conflicts with this Court's long established decisions on procedural default. Dobbs v. Zant, 113 S. Ct. 835 (1993); Coleman v. Thompson, 501 U.S. 722 (1991); Amadeo v. Zant, 486 U.S. 214 (1988).

In sum, review by this Court is required to resolve the sharp split among the lower courts regarding the duties and obligations of the government under Brady and its progeny. The issue posed in Mr. Strickler's case is of great significance to the fair and uniform administration of criminal prosecutions, both capital and noncapital, throughout the United States. For these reasons and those set forth in the pending petition for certiorari, there is a significant possibility that this Court would reverse the decision below.

The final factor for the Court to consider is whether irreparable harm is likely to result if the decision is not stayed. Mr. Strickler will die on September 16, 1998 -- just 64 days after the Court of Appeals on July 14, 1998, denied rehearing on his first habeas petition -- unless the Court grants a stay of execution. Because the proceedings have been expedited by the

Commonwealth, Mr. Strickler's imminent execution date will prevent this Court from considering Mr. Strickler's petition with the level of care that would have been possible but for the Commonwealth's rush to execute Mr. Strickler.

Mr. Strickler objected below that the proposed date unfairly truncated his time to seek relief from the U.S. Supreme Court and directed the courts' attention to Breard v. Angelone, 118 S. Ct. 1352 (April 18, 1998), discussed below. Respondent maintained that any relief in the form of a stay must come from this Court. The state circuit court entered an Order setting the execution as requested. The setting of a September date deprives Mr. Strickler of nearly one-third of the time allowed by the United States Supreme Court Rules to prepare and present a petition for a writ of certiorari. In this abbreviated time, not only must Mr. Strickler prepare and present a petition for writ of certiorari, but the Justices of this Court must review, consider, and rule on the issues therein. By setting this date, the State seeks to unfairly disadvantage Mr. Strickler and this Court in their abilities to adequately present and consider his claims from a first federal habeas petition by denying him the time which this Court has established as appropriate for those proceedings.

Most recently, in Breard v. Angelone, 118 S. Ct. 1352 (April 14, 1998), three Justices wrote individually to express their displeasure with the Commonwealth's practice:

> The Court of Appeals' decision denying petitioner's first application for a federal writ of habeas corpus became final on February 18, 1998. Under this Court's Rules, a timely petition for a writ of certiorari to

> review that decision could have been filed as late as May 19, 1998. See Rule 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment"). Ordinary review of that petition pursuant to our Rules would have given us additional time thereafter to consider its merits in the light of the response filed by the Commonwealth of Virginia. We have, however, been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today. There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases.

Id. at 1356-57 (Stevens, J., dissenting from denial of certiorari).

> [A]s Justice Stevens points out, Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's rules provide for ordinary cases. Like Justice Stevens, I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available.

Id. at 1357 (Breyer, J., dissenting from denial of certiorari).

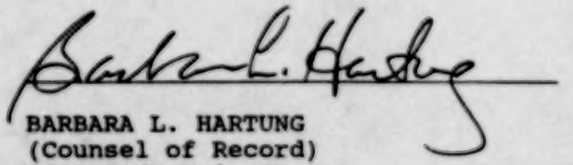
> I would grant the application for a stay of execution in order to consider in the ordinary course the instant petition, Breard's first federal petition for writ of habeas corpus.

Id. (Ginsburg, J., dissenting from denial of certiorari).

In order to give this Court the appropriate time to provide considered deliberation of the issues presented, the stay of execution should be granted to provide the Justices of this Court sufficient time to consider a petition for writ of certiorari on Mr. Strickler's first federal habeas corpus petition in this capital case.

WHEREFORE, for the reasons stated above and in his Petition for a Writ of Certiorari, Tommy David Strickler respectfully moves for a stay of his execution currently set for September 16, 1998.

Respectfully submitted,



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Counsel for Petitioner
Tommy David Strickler

August 31, 1998

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

COMMONWEALTH OF VIRGINIA,

v.

TOMMY DAVID STRICKLER,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Tommy David Strickler be carried out on the 16th day of September, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before September 16, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
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P.O. Box 26963
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Richmond, Virginia 23261

The Honorable Lee Ervin
Commonwealth's Attorney
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Barbara Hartung, Esquire
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Pamela A. Rumpz
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 23 day of July, 1998.

H H Wood
Judge

I ask for this:

Lee Ervin by John Reed ACA
Commonwealth's Attorney

Seen and objected to:

Barbara L. Hartung
Barbara Hartung
Counsel for Defendant 7/23/98

A True and Correct Copy,
Teste: Margaret R. Barbour Dep Clerk
Circuit Court
County of Augusta, Virginia

FILED: July 30, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 97-29(L)
(CA-95-924-3)

TOMMY DAVID STRICKLER,

Petitioner - Appellee,

versus

FRED W. GREENE, Warden, Mecklenburg Correctional Center,

Respondent - Appellant.

ORDER

Petitioner has filed a motion for stay of the mandate and for a stay of execution and respondent filed a response in opposition to the motion.

The Court denies petitioner's motion for stay of the mandate and for a stay of execution.

Entered at the direction of Judge Hamilton with the concurrence of Judge Niemeyer and Judge Luttig.

For the Court

/s/ Patricia S. Connor
Clerk

CERTIFICATION

I hereby certify that two copies of the enclosed Application For A Stay Of Execution were served by hand on counsel for Respondent, Pamela Rumpz, Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on Sept. 1, 1998.

BARBARA L. HARTUNG

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 14, 1998

No. 97-29
CA-95-924-3

TOMMY DAVID STRICKLER

Petitioner - Appellee

v.

FRED W. GREENE, Warden, Mecklenburg Correctional Center

Respondent - Appellant

No. 97-30
CA-95-924-3

TOMMY DAVID STRICKLER

Petitioner - Appellant

v.

FRED W. GREENE, Warden, Mecklenburg Correctional Center

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

FILED: July 30, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 97-29(L)
(CA-95-924-3)

TOMMY DAVID STRICKLER,

Petitioner - Appellee,

versus

FRED W. GREENE, Warden, Mecklenburg Correctional Center,

Respondent - Appellant.

ORDER

Petitioner has filed a motion for stay of the mandate and for a stay of execution and respondent filed a response in opposition to the motion.

The Court denies petitioner's motion for stay of the mandate and for a stay of execution.

Entered at the direction of Judge Hamilton with the concurrence of Judge Niemeyer and Judge Luttig.

For the Court

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

TOMMY DAVID STRICKLER,
Petitioner-Appellee,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,
Respondent-Appellant.

No. 97-29

TOMMY DAVID STRICKLER,
Petitioner-Appellant,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,
Respondent-Appellee.

No. 97-30

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-95-924-3)

Argued: March 6, 1998

Decided: June 17, 1998

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by unpublished per curiam opinion. Judge Luttig wrote a separate statement.

COUNSEL

ARGUED: Pamela Anne Rumpz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Barbara Lynn Hartung, Richmond, Virginia, for Appellee. **ON BRIEF:** Richard Cullen, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Mark E. Olive, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The petitioner, Tommy David Strickler, applied for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia following his conviction and death sentence for capital murder in the Circuit Court of Augusta County, Virginia. *See* 28 U.S.C. § 2254.[1] The district court granted the writ, reasoning that Strickler's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecutor failed to disclose certain evidence at trial. The Commonwealth of Virginia (the Commonwealth), acting through one of its wardens, appeals this ruling. In his cross-appeal, Strickler appeals the district court's dismissal of his claim that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally deficient. Although the district court correctly dismissed Strickler's proportionality review claim, the district court erred when it granted Strickler relief under *Brady*. Accordingly, we affirm in part, vacate in part, and remand with instructions to dismiss the petition.

[1]Because Strickler's petition for writ of habeas corpus was filed prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, the Chapter 153 amendments of the AEDPA do not apply in this case. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997) (holding that the Chapter 153 amendments, amendments applying to all federal habeas petitions, do not apply to federal habeas petitions pending on the date of the AEDPA's enactment). As to the Chapter 154 amendments, amendments applying to capital petitioners, we need not decide whether these amendments apply in this case because Strickler's claims are either procedurally defaulted or meritless under the more lenient pre-existing standards. Indeed, we are confident the AEDPA is of no help to Strickler.

I

In 1990, Strickler was convicted of, *inter alia*, the capital murder of Leanne Whitlock. As recounted by the Virginia Supreme Court on direct appeal, the facts surrounding Whitlock's murder are:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the Mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.
>
> Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.
>
> As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury that Leanne was driving, which was stopped in traffic, and pounded on the passenger side win-

dow. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[3] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had had with "it," describing "it" with a racial epithet.

[3]Leanne was black.

Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his blood-stained blue jeans and his shirt.

Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car near Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and

covered with leaves which had been deliberately packed around the logs.

Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground.

Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin, and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots.

Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human blood stains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human blood stains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

Strickler v. Commonwealth, 404 S.E.2d 227, 230-32 (Va. 1991).

On February 27, 1990, Strickler was charged with grand larceny, robbery, and abduction in Rockingham County.[3] That same day, Strickler was indicted by an Augusta County grand jury for the robbery and abduction of Whitlock.[4] On April 23, 1990, Strickler was indicted by an Augusta County grand jury for the capital murder of Whitlock. Following a jury trial in Augusta County Circuit Court, Strickler was convicted of all three charges. The jury fixed Strickler's punishment at life imprisonment for the robbery and abduction convictions. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder conviction. Based upon findings of Strickler's future dangerousness and the vileness of the crime, the jury fixed Strickler's sentence at death. The trial court sentenced Strickler in accordance with the jury's verdicts.

Strickler appealed his convictions and sentences to the Virginia Supreme Court, and that court affirmed. *See Strickler v. Commonwealth*, 404 S.E.2d 227 (Va. 1991). On November 4, 1991, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Virginia*, 502 U.S. 944 (1991).

Strickler then sought state collateral relief in the Circuit Court for Augusta County. In September 1993, the circuit court dismissed Strickler's state habeas petition. The Virginia Supreme Court granted a limited appeal to address whether: (1) the state habeas court erred in refusing to vacate Strickler's capital murder conviction because of an erroneous capital murder jury instruction; and (2) his trial counsels' failure to object to the capital murder jury instruction rendered his trial counsels' performance constitutionally ineffective. The Virginia Supreme Court found the former claim procedurally defaulted under state law. *See Strickler v. Murray*, 452 S.E.2d 648, 651 (Va. 1995). As to the latter claim, the court found that Strickler was not prejudiced by the erroneous capital murder instruction and, therefore, failed to meet his burden of showing that, but for trial counsels' error,

[3]Whitlock was abducted in Rockingham County, but murdered in Augusta County.

[4]As a result of the charges brought in Augusta County, the Rockingham charges were *nolle prosequi*.

the result of the proceeding would have been different. *See id.* at 652-53. On October 2, 1995, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Angelone*, 516 U.S. 850 (1995).

On March 5, 1996, Strickler filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia. On May 20, 1996, Strickler filed an amended petition. On January 16, 1997, the district court dismissed, among other claims, Strickler's claim concerning the Virginia Supreme Court's proportionality review of his death sentence.

Following discovery, Strickler moved for summary judgment on his *Brady* claim. In response, the Commonwealth filed a cross motion for summary judgment. On October 15, 1997, the district court granted Strickler's motion for summary judgment and denied the Commonwealth's cross-motion for summary judgment. The district court held that Strickler's constitutional rights were violated by the prosecutor's failure to disclose certain evidence at trial. The Commonwealth moved for a stay of the district court's judgment pending appeal, which the district court granted. Both Strickler and the Commonwealth noted timely appeals.

II

In the district court, Strickler contended that statements and letters written by Anne Stolzfus, a Commonwealth witness, as well as police reports contained in the Harrisonburg Police Department files,[5] contained exculpatory evidence which was required to be disclosed under *Brady*. The parties refer to this evidence as "the Stolzfus materials," and these materials appear as Exhibits one through eight to an affidavit submitted in the district court by William Bobbitt, Jr., one of Strickler's trial counsel. The district court concluded that Strickler's rights were violated under *Brady* and issued the writ on that basis.

For two reasons, the Commonwealth contends the district court erred in issuing the writ. First, the Commonwealth contends that the

[5]Harrisonburg is located in Rockingham County.

Brady claim is procedurally defaulted and that Strickler has not established cause and prejudice to excuse the procedural default. Second, the Commonwealth contends that Strickler's *Brady* claim fails on the merits.

Strickler's *Brady* claim was never presented to the Virginia state courts. Strickler's failure to raise the claim in state court brings into play the doctrines of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1. We may excuse a procedural default if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Id.* at 750.[6]

[6]Before this court, Strickler has not attempted to establish that our refusal to address his *Brady* claim would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Thus, resolution of the question of whether Strickler's *Brady* claim is procedurally defaulted turns on whether the factual basis of Strickler's *Brady* claim was available to him at the time he filed his state habeas petition.

We begin our discussion with a summary of the facts surrounding Strickler's *Brady* claim. Prior to trial, Detective Dan Claytor of the Harrisonburg Police Department interviewed Stolzfus on approximately five occasions. Detective Claytor took notes during, and typed reports of, his interviews with Stolzfus and received letters and "summaries" from Stolzfus. These documents, referred to by the parties as the "Stolzfus materials," were kept in Harrisonburg Police Department files.

On the day before trial, an article appeared in the Roanoke Times containing an interview with an unidentified prosecution witness, obviously Stolzfus. In the interview, Stolzfus summarized the circumstances surrounding Whitlock's abduction. This summary tracked her eventual trial testimony and also revealed a fact not contained in her trial testimony: that she had contacted Whitlock's boyfriend and viewed photographs of Whitlock.

At trial, Stolzfus testified that she was interviewed by Detective Claytor on several occasions and described Whitlock's abduction to a reporter from the Roanoke Times approximately one week prior to the trial. Stolzfus also testified that she had identified Strickler in a photo line-up.

As to the circumstances surrounding Whitlock's abduction, Stolzfus testified that on January 5, 1990, she went to the Valley Mall in Harrisonburg with her daughter. Around 6:00 p.m., they entered the Music Land store where she saw two men and a blond woman. One of the men was "revved up" and impatient. She described the physical

features of the three and their clothing. After Stolzfus left the store, she again encountered the trio inside the Valley Mall and spoke briefly to the woman. Shortly thereafter, Stolzfus and her daughter got into their car and stopped in the Valley Mall parking lot when a car came by. The driver was a black woman. Stolzfus described her as a "rich college kid," "beautiful," "well dressed," "happy," "singing," and "bright eyed." Stolzfus testified she got a good look at her and identified the driver as Whitlock.

Whitlock pulled in front of Stolzfus and stopped for traffic. The "revved up" man from the music store, whom Stolzfus later identified as Strickler, came out of the Valley Mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. The second man and the blond woman, seen earlier in the Valley Mall, tried to enter the car also. Whitlock accelerated and "laid on the horn." Strickler hit Whitlock repeatedly on her shoulder and head. When the car stopped, Strickler opened the passenger door, and the other two got into the backseat. The second man, later identified as Henderson, handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time."

Stolzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from" Stolzfus. Stolzfus returned to her car, faced Whitlock, and then asked her three times "are you O.K." Each time Whitlock looked at Stolzfus and then down to her right. Whitlock mouthed a word that Stolzfus did not understand. She then realized that Whitlock had said "help." Stolzfus pulled away and told her daughter to go inside the Valley Mall and get security. The daughter refused. Whitlock drove past Stolzfus very slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." Stolzfus told her daughter to write the license number down on an index card. Stolzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243."[7]

[7]For reasons not entirely clear from the record, Stolzfus did not report the incident to law enforcement. However, the record does reflect that Stolzfus was approached by Detective Claytor after she had told a fellow classmate at James Madison University about the January 5, 1990 incident and her classmate informed law enforcement.

On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a *Brady* motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all *Brady* material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stolzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

On federal habeas, Strickler served interrogatories and subpoenaed documents from various police and prosecution files. Pursuant to a subpoena, Strickler obtained the Stolzfus materials from the Harrisonburg Police Department files. Pursuant to another subpoena, Strickler obtained all materials concerning Stolzfus in the current custody of the Augusta County Commonwealth's attorney's office. The prosecutor's file contained Exhibits two, seven, and eight, but did not contain Exhibits one and three through six.[6]

[6]There is a dispute between the parties concerning which exhibits were disclosed to Strickler prior to trial. In response to Strickler's interrogatories, Lee Ervin, the prosecutor in Strickler's case, stated that he reviewed only Exhibits two, seven, and eight and had never reviewed Exhibits one and three through six prior to Strickler's trial. Ervin also stated that Exhibits two, seven, and eight were in his prosecution file and were disclosed to defense counsel pursuant to the open file policy. Bobbitt stated in his affidavit that he had never seen any of the Stolzfus materials prior to, or during, Strickler's trial, notwithstanding the open file policy. Similarly, Humes J. Franklin, Jr., Henderson's trial counsel, stated in his affidavit that he had no recollection of seeing any of the Stolzfus materials in Ervin's files. However, Thomas Roberts, Strickler's other trial counsel, stated in his affidavit that, although he could not recall if he had seen the Stolzfus materials, he did recall the "information contained in them." Roberts also stated that he had discussed with Bobbitt the "possibility that Ms. Stolzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time." According to Roberts, "[i]t seemed too good to be true." The district court never resolved this dispute because the district court concluded that even if Exhibits two, seven, and eight were disclosed to Strickler, his rights under *Brady* were violated. We need not decide this factual dispute because, as discussed *infra*, Strickler's *Brady* claim is procedurally defaulted; Strickler has not established cause and prejudice to excuse the default; and the claim is, in any event, without merit.

As noted above, the Stolzfus materials appear as Exhibits one through eight to an affidavit submitted in the district court by Bobbitt. Exhibit one is a one-page document containing Detective Claytor's hand-written notes of his initial January 19, 1990 interview with Stolzfus. The notes reveal that Stolzfus could not identify Whitlock; could identify the blond woman; and indicated that Henderson was tall, had black hair, and wore a cream colored jacket. Exhibit two is a six-page, typed report of Detective's Claytor's interviews with Stolzfus on January 19 and 22, 1990. The report contains a detailed summary of Stolzfus' account of Whitlock's abduction. However, Detective Claytor's report notes that Stolzfus was not sure if she could identify Strickler and Henderson, although Stolzfus indicated she might if she saw Strickler and Henderson in person. Exhibit two also notes that Stolzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. According to the report, the next day Stolzfus advised police that she now recalled the license number, NKA 243, and "had made up a code to help remember the license number after the incident, 'No Kids After 243.'"

Exhibit three entitled "Observations" was given to Detective Claytor by Stolzfus on January 19, 1990, at 1:00 p.m. In this exhibit, Stolzfus describes the abduction with a set of diagrams.

Exhibit four is a typed letter, dated January 22, 1990, to Detective Claytor signed by Stolzfus. In this letter, Stolzfus explains that although she did not initially remember being at the Valley Mall on the evening Whitlock was abducted, her memory was "jogged" when her daughter reminded her of a small purchase at a shop in the Valley Mall. In this exhibit, Stolzfus also explains that she was uncertain about portions of the events she witnessed the evening of Whitlock's abduction:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person? . . .

Exhibit five is an undated, typed document entitled "Notes for Detective Claytor: My Impressions of the Car." In this exhibit, Stolzfus gives a description of the car driven by Whitlock, but does not mention the license plate or the license plate number.

Exhibit six is a hand-written note to Detective Claytor from Stolzfus dated January 25, 1990, 1:45 a.m. In this note, Stolzfus reports that she spent several hours with Whitlock's boyfriend viewing photographs and was certain Whitlock was the black girl she saw on January 5, 1990.

Exhibit seven is a typed two-page letter dated January 26, 1990, to Detective Claytor and signed by Stolzfus. This letter contains a description of Stolzfus' encounter with Strickler, Henderson, and the blond woman at the music store in the Valley Mall.

Exhibit eight is a three-page, typed document, undated and signed by Stolzfus. The document is entitled "Details of Encounter with Mountain Man, Shy Guy and Blond Girl." This exhibit contains a detailed description of Stolzfus' encounter with Strickler, Henderson, and the blond woman in the Valley Mall and of Whitlock's abduction. The summary of Whitlock's abduction in this exhibit essentially mirrors her trial testimony and the facts set forth in the Roanoke Times article.[9]

We are of the opinion that the factual basis of Strickler's *Brady* claim was available to him at the time he filed his state habeas petition and, therefore, the *Brady* claim is procedurally defaulted under the authority of *Hoke* and Va. Code Ann. § 8.01-654(B)(2). Strickler,

[9]The Roanoke Times article was produced by the Commonwealth as an exhibit in its cross-motion for summary judgment.

of course, knew that Stolzfus was interviewed by Detective Claytor on several occasions and had identified Strickler in a photo line-up. In light of these facts, reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files concerning Stolzfus' statements to Detective Claytor. Upon such a simple request, it is likely the state court would have ordered the production of the files. In other words, in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files, *see* Va. S. Ct. Rule 4:1(b)(5) (extending discovery, with prior leave of court, to all matters that are relevant and not privileged). His failure to do so results in a procedural default of his *Brady* claim.

Having concluded that Strickler's *Brady* claim would be procedurally defaulted if he attempted to raise it in state court at this time, we can only address Strickler's *Brady* claim if he can demonstrate cause and actual prejudice. *See Coleman*, 501 U.S. at 750. Objective factors that constitute cause include "'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *McClesky v. Zant*, 499 U.S. 467, 493-94 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988). Additionally, the novelty of a claim has been held to constitute cause. *See Reed v. Ross*, 468 U.S. 1, 12-16 (1984); *see also Dugger v. Adams*, 489 U.S. 401, 407 (1989) (stating that cause may be established upon demonstration that a constitutional claim is "so novel that its legal basis is not reasonably available to counsel"). Finally, a petitioner may establish cause by showing he received constitutionally ineffective assistance of counsel. *See Coleman*, 501 U.S. at 753; *Murray*, 477 U.S. at 488.[10]

[10]Generally, "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 489; *see also Pruett v. Thompson*, 996 F.2d 1560, 1570 (4th Cir. 1993). This is so because allowing a petitioner to raise a claim of ineffective assistance of counsel for the first time on federal habeas review in order to show cause for a procedural default would place the federal habeas court "in the

Strickler asserts that the factual basis for his *Brady* claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause for the procedural default. But, as noted above, Strickler's *Brady* claim was available to him in state court through the exercise of reasonable diligence. As such, he cannot establish cause based upon the unavailability of the *Brady* claim. *See Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994) ("Even if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.").

Strickler also argues that his trial counsel were constitutionally ineffective for failing to make a *Brady* motion at trial. If attorney error amounts to constitutionally ineffective assistance of counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Amendment dictates that the attorney's error must be imputed to the state. *See Coleman*, 501 U.S. at 754. Accordingly, Strickler may establish cause to excuse his procedural default by showing trial counsel error that satisfies the standard set forth in *Strickland*. *See id.* at 752. Under *Strickland*, a defendant is deprived of the assistance of counsel guaranteed by the Constitution when counsel's performance falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

In this case, Strickler's trial counsels' action did not fall below an objective standard of reasonableness. In light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion. *Cf. Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir. 1983) ("Counsel had no duty to file pre-trial motions, because the prosecutor established an open file policy that made filing of discovery motions or *Brady* requests pointless.").

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anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available" in contravention of "[t]he principle of comity that underlies the exhaustion doctrine." *Murray*, 477 U.S. at 489. Strickler has satisfied this requirement by presenting an ineffective assistance of counsel claim based on trial counsels' failure to file a *Brady* motion to the state court on state habeas.

Even if we were to agree with Strickler that cause exists to excuse his procedural default, Strickler cannot establish prejudice. To establish "actual prejudice," Strickler "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir.), *cert. denied*, 118 S. Ct. 595 (1997).

Under *Brady* and its progeny, the prosecution's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Ellis*, 121 F.3d 908, 914 (4th Cir.) (quoting *Brady*, 373 U.S. at 87), *cert. denied*, 118 S. Ct. 738 (1998); *accord Kyles v. Whitley*, 514 U.S. 419, 431 (1995). However, evidence is material "only where there exists a 'reasonable probability' that had the evidence been disclosed the result of the trial would have been different." *Ellis*, 121 F.3d at 914 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995)). A "reasonable probability" of a different result is shown when the government's failure to disclose evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

In our view, the Stolzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial. During either phase, Strickler never contested that he abducted and robbed Whitlock. In fact, counsel for Strickler argued to the jury during the guilt phase that they should convict Strickler of first degree murder rather than capital murder because Henderson, rather than Strickler, actually killed Whitlock. Thus, Stolzfus' testimony was not critical to the Commonwealth's case, especially in view of the overwhelming evidence in the record, independent of Stolzfus' testimony, demonstrating that Strickler abducted and robbed Whitlock. During the sentencing phase, Stolzfus' testimony was of no import. For the future dangerousness aggravating circumstance, the parties focused their arguments on Strickler's prior criminal record, which included approximately eleven prior convictions. As to the vileness predicate, although the prosecutor did state the uncontested fact that Whitlock was abducted, the focal point of his argument was on the use of the sixty-nine pound boulder to crush and fracture Whitlock's skull. In

short, the failure to disclose any or all of the Stolzfus materials does not undermine our "confidence in the outcome of the trial." *Id.*

In summary, Strickler's *Brady* claim is procedurally defaulted and he has failed to establish cause and prejudice to excuse the default. Accordingly, the district court erred when it granted the writ on Strickler's *Brady* claim.[11]

III

In his cross-appeal, Strickler contends that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally inadequate. In response, the Commonwealth contends that this claim is procedurally defaulted and that Strickler has not established cause to excuse the procedural default. Alternatively, the Commonwealth argues that the claim is without merit.

Strickler presented this claim for the first time in his state habeas petition and it was found to be procedurally defaulted under the authority of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). In *Slayton*, the Virginia Supreme Court held that claims that could have been raised at trial or on direct appeal but were not cannot be considered on collateral review. *Id.* at 682. The district court held that Strickler's proportionality review claim was procedurally defaulted under *Slayton* and that Strickler failed to establish cause and actual prejudice to excuse the default.

Absent cause and actual prejudice or a miscarriage of justice,[12] a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. *See Harris v. Reed*, 489

[11]Even if we could get beyond the threshold question of procedural default, for the same reasons why Strickler cannot demonstrate prejudice to excuse the procedural default of his *Brady* claim, Strickler's *Brady* claim fails on the merits.

[12]Because Strickler has not attempted to establish that our refusal to address his procedurally defaulted proportionality review claim would result in a miscarriage of justice, we do not address the miscarriage of justice exception.

U.S. 255, 262 (1989). Such a rule is adequate if it is regularly or consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Under federal habeas law, we are not at liberty to question a state court's application of a state procedural rule because a state court's finding of procedural default is not reviewable if the finding is based upon an adequate and independent state ground. *See Harris*, 489 U.S. at 262; *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). Because *Slayton* is an independent and adequate state ground, we can consider only whether cause and prejudice exists to excuse the procedural default, not whether the state court correctly applied its own law. *See Harris*, 489 U.S. at 262.

Strickler contends that he has established cause because he was unable to raise his proportionality review claim until after the Virginia Supreme Court conducted such a review and subsequently affirmed his sentence on direct review. We disagree.

As noted earlier, objective factors that constitute cause include "'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *McClesky*, 499 U.S. at 493-94 (quoting *Murray*, 477 U.S. at 488). Findings of the state court supporting its decision to apply the state procedural default rule are entitled to a presumption of correctness in determining whether cause exists to excuse a procedural default. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Stockton*, 41 F.3d at 924.

An issue before the Virginia Supreme Court on direct appeal was whether Strickler's death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *See* Va. Code Ann. § 17-110.1(C)(2). Obviously, Strickler was free to assert, and the Virginia Supreme Court was free to entertain, a facial challenge to all proportionality review in the Commonwealth of Virginia on direct appeal, prior to the Virginia Supreme Court's proportionality review. Furthermore, Strickler was

free to assert, and the Virginia Supreme Court was free to entertain, an as-applied challenge to the proportionality review that he received on direct appeal in a rehearing petition to the Virginia Supreme Court. In fact, Strickler filed a petition for rehearing, but did not challenge the Virginia Supreme Court's proportionality review of his death sentence. Accordingly, Strickler has not met his burden of "'showing that the factual or legal basis for [the proportionality review] claim was not reasonably available to counsel,'" *McClesky*, 499 U.S. at 494 (quoting *Murray*, 477 U.S. at 488), and, therefore, has failed to establish cause to excuse the procedural default.[19]

IV

For the reasons stated herein, the judgment of the district court is affirmed in part, vacated in part, and remanded with instructions to dismiss the petition.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

LUTTIG, Circuit Judge:

Appellee/cross-appellant Tommy Strickler has filed a motion that I be disqualified from participation in the decision of this case pursuant to 28 U.S.C. § 455. (On different grounds, counsel for Strickler

[19]Even if we were able to get past the threshold question of procedural default, Strickler would not be entitled to relief. First, it is well-settled that no proportionality review is constitutionally mandated. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). As we stated in *Petersen v. Murray*, 904 F.2d 882 (4th Cir. 1990), "this court may not issue a writ of habeas corpus on the ground that the [Virginia] Supreme Court has made an error of state law." *Id.* at 887 (citation and internal quotes omitted). *See also Buchanan v. Angelone*, 103 F.3d 344, 351 (4th Cir. 1996) (stating that claim that proportionality review was inadequate cannot form the basis of federal habeas corpus relief), *aff'd*, 118 S. Ct. 757 (1998). Second, we have examined the proportionality review conducted by the Virginia Supreme Court, *see Strickler v. Commonwealth*, 404 S.E.2d at 237, and we cannot conclude that Strickler has been denied any federal constitutional right, if one were to exist, to adequate and meaningful proportionality review.

earlier sought, and was denied, recusal of the state habeas judge.). As grounds for disqualification, Strickler's counsel, Barbara L. Hartung and Mark E. Olive, cite the "unavoidable parallels" between the murder of my dad and the murder of Leanne Whitlock for which Strickler stands convicted. The Commonwealth opposes the motion for the reasons stated in its response.

The circumstances surrounding my dad's murder are so different from those surrounding the murder of Leanne Whitlock that, in my judgment, no one, except those who believe I should not sit in any murder case because my dad was the victim of a murder, could, on this ground, reasonably question my ability to sit impartially on the panel deciding this case. Moreover, the legal issues presented in this appeal have no counterpart whatever in any of the proceedings involving those who murdered my dad. Accordingly, the motion is denied.

My dad was murdered in the driveway of his home in Tyler, Texas, during a carjacking, at approximately 11:00 p.m. on April 19, 1994 — more than four years ago now. Upon exiting his vehicle in the garage, my dad was confronted by three armed, black youths, and shot twice in the head with a .45 caliber weapon. A single shot was fired at my mother, but she was not struck. The three perpetrators left my parents' home immediately. No personal items, other than the car, were stolen from my dad or my mother. Nothing was stolen from the interior compartments of my parents' car. At trial, it was shown that the three youths who murdered my dad had contemplated, and actually attempted, other carjackings in the immediately preceding days and that they had, on the night of the murder, followed my mother and dad to their home, having the purpose and intent of stealing my parents' vehicle. Although the three who murdered my dad were black, there was no testimony presented of either racial motivation or racial animus. Two of the three youths were convicted in federal court on carjacking charges and in state court on murder charges. The third was convicted of capital murder in state court.

There are few parallels between the circumstances of my dad's murder and the circumstances of Leanne Whitlock's murder, and those that do exist are the most general in nature — for example, that three perpetrators were involved and that they stole a vehicle. Leanne

Whitlock was a black female, and a sophomore at James Madison University when she was murdered. Whitlock was forcibly abducted from a shopping mall parking lot in the early evening hours by Strickler, a white adult male, and two white adult companions.

The three forced Whitlock to drive to a distant cornfield, where she was apparently raped, and then killed with a 69-pound boulder. *Id.* at 231. According to the Virginia Supreme Court, whose findings in this particular regard are not before us for review:

> Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking.

Id. The Virginia Supreme Court affirmed that Whitlock's "[d]eath was caused by four large, crushing, depressed skull fractures with lacerations to the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were embedded in the brain." *Id.* Whitlock's nude, frozen, buried body was subsequently found in the field by authorities. Again according to the Virginia Supreme Court, the shirt worn by Strickler the night of the murder "bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified." *Id.* at 231-32. Said the court:

> Prior to [Whitlock's] murder, the victim had been abducted by strangers, was terrified and called for help, was driven to a deserted field, was dragged, struggling, out of her car, was stripped naked, beaten, kicked, and sexually assaulted.

Id. at 237.

After the murder, Strickler and his codefendant discussed, in the presence of a third person, a fight they had had with a "nigger," *id.* at 231; Strickler said they had kicked the "nigger" in the back of the head, had used a "rock crusher," and that the "nigger" would give

them no more trouble. *Id.* Strickler, his codefendant, and the third person then drove back to the town where the murder occurred "to purchase drugs." *Id.*

Strickler was indicted for robbery of not only Whitlock's vehicle, but also other of her personal property, including her wristwatch, earrings, and bank card. *Id.* at 230-31. Although Strickler was indicted and apparently convicted for robbery of Whitlock's vehicle, it is unclear whether Whitlock's vehicle was stolen principally for the value of the car itself or instead as a get-away vehicle; the suggestion is that the latter was the purpose. *See Strickler* v. *Commonwealth*, 404 S.E.2d 227, 230 (Va. 1991) ("Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounded on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window.").

Apart from the dissimilarity of the circumstances between my dad's murder and Whitlock's murder, to my knowledge the issues presented by this appeal under *Brady* v. *Maryland*, 373 U.S. 83 (1963), bear no resemblance in any respect to any of the issues raised by any of those convicted of my dad's murder in any of their proceedings to date. Indeed, insofar as I am aware, there has never been raised an issue of changing eye-witness testimony or the improper withholding of exculpatory evidence in any of the appeals from the convictions for my dad's murder.

Against the backdrop of the factual and legal dissimilarities between my dad's murder and the appeals from the ensuing convictions on the one hand, and Leanne Whitlock's murder and the instant appeal on the other, the natural inference arises that the present disqualification motion has been filed not because my dad was the victim of a murder, but, rather, because I am the author of three, and I joined a fourth, of this Circuit's authorities which Strickler's counsel could have reasonably surmised might bear upon the disposition of the appeals *sub judice*. *See Barnes* v. *Thompson*, 58 F.3d 971 (4th Cir. 1995) (Luttig, J.), *cert. denied*, 116 S. Ct. 4351 (1995); *Hoke* v. *Netherland*, 92 F.3d 1350 (4th Cir.) (Luttig, J.), *cert. denied*, 117 S. Ct. 630 (1996); *In re Netherland*, No. 97-8 (4th Cir. Apr. 10, 1997) (Luttig, J., single Circuit Judge) (staying district court's *ex parte* grant

of pre-petition discovery to state prisoner); *In re Pruett*, 133 F.3d 275 (4th Cir. 1997) (Hall, J., joined by Luttig and Motz, JJ.).

Because of the time that has elapsed since my dad's murder; the dissimilarity of the circumstances surrounding my dad's and Leanne Whitlock's murders; and the lack of any overlap in the legal issues presented in the appeals of the two cases, I do not believe that it can reasonably be maintained either that I cannot impartially sit in judgment of this appeal or that my impartiality can fairly be questioned. Nor, any more than recusal from discrimination cases should be required by judges who themselves, or whose families, have been subjected to invidious racial or sexual discrimination, do I believe that my recusal is required from this and all other murder cases for the reason alone that my dad was the victim of a murder.

The purpose of section 455 is not to require recusal from the courts of all who have experienced the fullness of life — good and bad; and certainly its purpose is not to enable forum shopping by parties to litigation. Rather, its purpose is only to ensure that the matters before the courts are decided by a judiciary that is impartial both in fact and in appearance. I do not believe that this indisputably important purpose is, in any way, compromised or disserved by my participation in this case. As I have earlier stated in open court, capital defendants are entitled to fair and impartial consideration of their claims by me when I am randomly selected to serve on the panel hearing their cases. Neither before nor after my dad's murder have they received less.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
DEC 10 1996
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, Warden,

Respondent.

Civil Action
No. 3:95cv924

ORDER

The Court is in receipt of the respondent's motion to dismiss petitioner's habeas corpus petition. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court grants respondent's motion to dismiss with respect to claims B(10),C,E,G,H,I,K,L,M,O,P,Q,R,T, and V.

The Court grants an evidentiary hearing on the remainder of petitioner's claims.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

DEC 10 1996

DATE

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
DEC 1 [illegible]
CLERK, U.S. DISTRICT COURT
RICHMOND VA

TOMMY DAVID STRICKLER,)
)
Petitioner,)
)
v.) Civil Action
) No. 3:95CV924
J.D. NETHERLAND,WARDEN)
)
)
Respondent.)
)

MEMORANDUM

On September 19, 1990 the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254 Strickler filed a Petition for a Writ of Habeas Corpus and an Amended Petition for a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. This matter comes before the Court on Respondent's motion to dismiss Strickler's petition for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion has been fully briefed by the parties and is ripe for decision.

BACKGROUND

1. Procedural History:

On February 27, 1990 the Circuit Court of Augusta County,

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Virginia charged Strickler on one count of abduction and one count of robbery. On April 23, 1990 the court indicted him for capital murder. Strickler pleaded not guilty to all charges. Strickler was tried by a jury before the Circuit Court of Augusta County (J.Wood) and found guilty of capital murder, robbery ,and abduction. The jury sentenced him to two life sentences and to death on June 21, 1990, and the judge upheld the sentence in the sentencing hearing on September 19, 1990.

On April 19, 1991 the Virginia Supreme Court upheld Strickler's conviction and sentence in Strickler v. Commonwealth, 404 S.E.2d 227 (1991). The United States Supreme Court denied his petition for a writ of certiorari. Subsequently, Strickler filed a petition for a writ of habeas corpus in the Circuit Court of Augusta County. The court dismissed the petition in full without an evidentiary hearing on September 10, 1993. The Virginia Supreme Court granted certiorari with respect to limited issues, but denied the petition on January 13, 1995. Strickler v. Netherland, 452 S.E.2d 648 (1995). Strickler's petition for a writ of certiorari to the United States Supreme Court was denied on October 2, 1995. On March 5, 1996 Strickler filed his federal habeas corpus petition in this Court.

Factual Background

In affirming Strickler's conviction and sentence on direct

appeal, the Virginia Supreme Court stated the facts of the case as follows:

On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne *486 dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.

Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.

As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[1] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans

[1]Leanne was black

which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head-on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his bloodstained blue jeans and his shirt. Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car behind Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs. Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and

thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground. Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots. Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human bloodstains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

DISCUSSION

The Applicability of the 1996 Antiterrorism and Effective Death Penalty Act

On April 24, 1996 while Strickler's petition was pending, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L.No. 104-132, 110 Stat.1214 ("the Act") became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101-106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28

U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to petitions in capital cases.

Respondent asserts that the Act, which amends and adds to pre-existing law governing habeas corpus review, should be applied retroactively in resolving the issues presented by Strickler's petition. Strickler argues that the law in effect at the time he filed the petition should govern. Before addressing the substance of Strickler's claims, it is, therefore necessary to determine whether, and to what extent, the Act applies to Strickler's petition.

Chapter 154, New Habeas Corpus Provisions:

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt in" procedures: 1)the "post-conviction" procedure provided by Section 2261; or 2) the "unitary review" procedure provided by Section 2265. The substantive changes this chapter makes to the law currently governing federal habeas review are summarized by the district court in Hill v. Butterworth:

> If a state opts in to the new habeas provisions, it receives several procedural benefits. First, petitions for habeas relief under Section 2254 must be filed in federal court within 180 days 'after final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.' 28 U.S.C. § 2264(a). Second, federal district courts are limited to only considering 'a claim or

> claims that have been raised and decided on the merits in the State courts.' 28 U.S.C. § 2264. Third, adjudication of a petition subject to Chapter 154 must be given priority by the district court and court of appeals 'over all noncapital matters.' 28 U.S.C. § 2266 (a). Fourth, reviewing courts are forced to expedite their review of habeas petitions brought under the Chapter 154. District courts must render a final judgment on a habeas petition within 180 days after the petition is filed, allowing the parties at least 120 of those days to brief the case and have a hearing on the merits. A court of appeals must hear and render a final determination of an appeal within 120 days after the reply brief is filed. 28 U.S.C. § 2266. Fifth, no amendment to a habeas petition subject to Chapter 154 is permitted after the filing of the answer to the petition, except on certain grounds set forth in § 2244(b). 28 U.S.C.§ 2266(b)(3)(B).

Hill v. Butterworth 1996 WL at *3 (N.D. Fla. Aug. 7, 1996).

The Fourth Circuit in Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996) requires this Court to analyze Strickler's petition under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." See § 107(c). But, the Court of Appeals explained that the new provisions only affect habeas petitions if "the state has established procedures to ensure the appointment of qualified counsel to represent indigent petitioners in state post-conviction proceedings." Id. at 1342. Since, Virginia does not have a unitary review procedure, the Court must analyze whether Virginia meets the post-conviction review procedures and thus qualifies as an opt in state.

To qualify as an opt in state a state specifically must meet

all four of the following criteria:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. See § 2261(b)-

2. Such mechanism must provide standards of competency for the appointment of such counsel. See § 2261(b)

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. See § 2261(c)

4. Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. See § 2261(c)

Has Virginia Satisfied the Opt-in Requirements

Since July 1, 1995 the appointment of counsel for post-conviction capital cases is required under the Va. Code § 19.2-163.7. Between July 1, 1992 and June 30, 1995, however, the appointment of counsel in the post-conviction process was made upon request by the petitioner. Va. Code § 19.2-163.7 (prior to 1995 amendment). The Fourth Circuit has not decided whether Virginia's post-conviction appointment provisions qualify it as an opt-in state. The Court of Appeals did not reach the issue in Bennett v. Angelone because Virginia's system of post-conviction appointment provisions was set up "after petitioner's Virginia habeas petition had been finally denied by the Virginia Supreme Court." Id. at 1342. Here, however, Strickler's state habeas

petition was filed and denied by the Supreme Court of Virginia after Virginia's 1992 post-conviction system was in place. Thus, the Court must examine whether the procedures in effect when Strickler filed his petition, September 1992, satisfy the opt-in requirements. [2]

Judge Payne of the Eastern District of Virginia considered the issue in Satcher v. Netherland, No. 3:95cv261 (E.D. Va. October 8, 1996). Judge Payne concluded that Virginia was not an opt-in state because it post-conviction counsel mechanisms in place between 1992 and 1995 failed to meet three of the four requirements laid out by § 107. The Court agrees with the Satcher holding that while Virginia substantially complied with the Act's requirement for the time period in question it failed to adhere to the strict formal requirements of the Act.

Only since July 1, 1995 has Virginia required by statute the appointment of competent counsel to represent indigent petitioners in its post-conviction proceedings. Before that

[2] There is some dispute as to which date courts should consider when analyzing the opt-in provisions. The Fourth Circuit in dicta suggests that courts should look at the system in place when the Virginia Supreme Court denied the petition. 92 F.3d at 1342. The district court in Wright v. Angelone, however, looked at the provisions in place when petitioner's state counsel was appointed. No. 2:96cv830 (E.D. Va. Oct 15, 1996). Since the provisions lay out the appointment of counsel the district court's approach seems the most logical. Under either method, however, the result is the same. Since Respondent picks the time of filing the state petition, the Court will look at the provisions in place at that time.

time, counsel was appointed at *petitioner's request*. Section 107, however, requires a statutory appointment mechanism that places an affirmative and automatic duty upon the State to offer competent post-conviction counsel to all prisoners sentenced to death. The Commonwealth's system in effect when Strickler filed his petition did not place such an affirmative duty upon the state. Thus while no indigent capital defendants have gone unrepresented in Virginia state habeas proceedings, the Court finds that the statute fails to meet the formal requirement of the Act. See Wright v. Angelone, action no 2:96cv830.

Furthermore, the Va. code does not provide for the compensation and reimbursement litigation expenses for such counsel. While Virginia substantially complies with the law by the General Assembly's appropriations acts that provide for the payment of such counsel it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." Bennett, 92 F.3d at 1342 n.2. This same conclusion was reached by the court in Satcher.

As the court in Satcher noted,"if Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance

based on past performance, it could have done so." Id. Congress instead chose to confer the benefits only if states made a formal commitment to provide a post-conviction review system that protected capital litigants' constitutional rights. Id. This Court agrees with this analysis and finds that Virginia's system for compensation and payment of expenses fails to meet the standards established by § 107.

Virginia does not qualify as an opt-in state because it fails to adhere to the formal requirements of § 2261. While it substantially complies with the Act's provisions, its statutory scheme does not establish the rigid standards for providing counsel to indigent defendants or compensating the counsel. Therefore, it can not enjoy the "benefits" provided by the § 2261 of the Act.

Chapter 153 Amendments

Respondent argues that the general habeas provisions contained in Chapter 153 of the Act, §§ 101-106 apply to Strickler's petition. These procedures effect a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Unlike Chapter 154, they are not made explicitly applicable to petitions pending when the Act took effect. Nonetheless, the Commonwealth urges the retroactive application of the Chapter 153 amendments to Strickler's petition. This Court, however, agrees with the Satcher analysis and finds that

the Chapter 153 amendments do not apply retroactively.

The Supreme Court most recently addressed the question of retroactivity in Landgraf v. USI Film Prods., __ U.S. __, 114 S.Ct. 1483 (1994). In Landgraf, the petitioner sought the application of a new statute (Title VII of the Civil Rights Act of 1991) to cases pending on the date the new law was enacted. The Supreme Court rejected that interpretation and reaffirmed the presumption against retrospective application of statutes. Id.at 1503. The Court explained that retroactive application of legislation is disfavored because

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id.at 1497.

In Landgraf the Court determined that when faced with the retroactivity question, a court must first determine whether Congress "has expressly prescribed the statute's proper reach." Id.at 1505. In the absence of clear congressional intent, a court must determine whether a statute would have retroactive effect, "i.e. whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id.at 1505. If the court finds such a retroactive effect, the traditional presumption "teaches that it does not

govern absent clear congressional intent favoring such a result."Id.

After examining the language of the Chapter 153 amendments the Court finds that the Supreme Court's analysis in Landgraf prohibits retroactive application of the Act. The language of the Chapter 153 amendments contains no express provision of retroactivity. Congress, however, clearly considered the issue when drafting the Act. Section 107(c) of the Act states that "Chapter 154...shall apply to cases pending on or after the date of enactment of this Act." The Act, however, contains no similar provision for the Chapter 153 amendments. See Bennett v. Angelone, 92 F.3d at 1342-43. Congress' failure to include similar language for the Chapter 153 amendments reflects its intent that these provisions are not to apply retroactively. See Russello v. United States, 464 U.S. 16, 23 (1983)("[W]here Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

Both the Second and the Tenth Circuits have held that the Chapter 153 Amendments are not applicable to pending petitions. See Boria v. Keane, 90 F.3d 36, 38 (2nd Cir. 1996)("While Congress has spoken clearly in some portions of the new statute

with respect to the application of the statue to pending cases, see, e.g., § 107(c), in the context of non-capital habeas cases the statute's silence is striking. This silence coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."); Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996).

The Court finds that provisions of Chapter 153 would definitely have a retroactive effect if applied to petitioner's case. Since Congress did not expressly state that they should be applied retroactively, the Court concludes that it must follow the traditional presumption against retroactive application. Thus the Court finds that neither the new Chapter 153 amendments nor the new Chapter 154 provisions apply to Strickler's petition. Therefore, the Court will analyze Strickler's claims based on the law governing federal habeas corpus review in effect at the time he filed his petition.

Strickler's Claims:

In his federal habeas petition Strickler raises the following claims:

(A) Insufficiency of the evidence to support the verdict of capital murder

(B) Ineffective assistance of counsel

(C) Strickler did not receive the mental health expert assistance guaranteed by Ake v. Oklahoma

(D) Strickler's death sentence was arbitrary and capricious, and also disproportionate to the sentence

received by his more culpable co-indictee

(E) Improper jury instructions violated Strickler's Sixth, Eighth, and Fourteenth Amendment rights.

(F) The trial court's failure to allow counsel to ask or inform jurors about parole

(G) The trial court erroneously limited voir dire about jurors' ability to show mercy and thus follow their oaths as jurors in considering a life sentence

(H) The trial judge's refusal to qualify jurors Almarode and Wills

(I) The trial judge's failure to excuse for cause jurors Ramsey and Brooks

(J) Strickler's rights under the Sixth, Eight and Fourteenth Amendments were violated when the commonwealth withheld exculpatory evidence

(K) The prosecutor knowingly presented false testimony at Strickler's capital murder trial

(L) Strickler was deprived of his rights to a fair trial and due process of law under the Sixth, Eight, and Fourteenth Amendments when the Commonwealth presented inconsistent testimony and argument on the evidence at the two trials

(M) Strickler is actually innocent of the crime and the sentence

(N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty

(O) Strickler's rights under the Sixth, Eight, and Fourteenth Amendments were deprived by prosecutor's improper comments in opening and closing arguments

(P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eight, and Fourteenth Amendments to the Constitution

(Q) The death penalty is cruel and unusual and therefore is unconstitutional

(R) Vileness and future dangerousness under the Virginia death penalty statue are unconstitutionally vague

(S) The evidence was insufficient to establish either future dangerousness or vileness

(T) Juror misconduct

(U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution

(V) Ineffective assistance of appellate counsel

The Commonwealth contends that most of Strickler's claims are procedurally barred and those that are not lack merit. As a preliminary matter the Commonwealth does not dispute that Strickler has exhausted his state remedies and his claims are thus properly before this Court.

A. Insufficiency of the evidence to support the verdict of capital murder

Strickler first claims that there was insufficient evidence to convict him of capital murder. Respondent concedes that there are no procedural difficulties with this claim. Under Virginia's triggerman statute, only the immediate perpetrator of a crime may be convicted of capital murder. A conviction based on circumstantial evidence regarding who did the actual killing must "exclude every reasonable hypothesis of innocence." Rogers v. Commonwealth, 410 S.E.2d 610,627 (1991).

The Virginia Supreme Court found that there was sufficient evidence to convict Strickler of capital murder. Under § 2254(d) the state court's findings are presumed to be correct unless they fall under one of the listed eight factors. In this case the Virginia Supreme Court relied on misstatements of the record and thus lose their presumption of correctness under § 2254(d)(8). The state court improperly stated Donna Tudor's testimony about the condition of Strickler's clothing and ignored testimony of other individuals at Dice's Inn who did not describe Strickler as wearing such stained clothing that night. The Supreme Court also misstated the forensic evidence. It ignored critical testimony about additional hairs near the victim which were not Strickler's; and the expert's inability to match the semen found in the victim's body with any individual.

The jury undoubtedly had sufficient evidence to conclude that Strickler was present at the crime. The question here, however, concerns the sufficiency of the evidence to support its determination that Strickler actually committed the killing and was not an observer or accomplice. While the Court believes the inquiry is not easy; it finds that Strickler is entitled to an evidentiary hearing on the claim and that it should not be dismissed.

B. Ineffective assistance of counsel

Petitioner claims that his trial counsel rendered him ineffective assistance of counsel both during the guilt and to sentencing phases. Petitioner enumerates many instances of purported ineffectiveness, some of which respondent claims are procedurally defaulted.

The standard for ineffective assistance of counsel is set up in Strickland v. Washington, 466 U.S. 668 (1983/4). In Strickland, the Court set up a two pronged inquiry to assess counsel's performance. In order to prove ineffective assistance, a petitioner must show that counsel's performance fell below minimum standards while overcoming a strong presumption towards reasonableness. Not only do petitioners have to prove deficient performance, they must also show that counsel's errors prejudiced them. The Supreme Court defined prejudice as a reasonable probability that counsel's errors undermined confidence in the outcome of the trial.

Strickler raises numerous instances of ineffective assistance that he claims rise to the Strickland level. After reviewing his various allegations, the Court finds that this claim should not be dismissed and that Strickler should be granted an evidentiary hearing on the issue to resolve genuine issues of material facts. The failure of Strickler's counsel to pursue a voluntary intoxication defense is procedurally barred, but the other components of his claims pass the procedural

hurdles. While some of counsel's alleged ineffectiveness do not by themselves rise to the Strickland level, when examined all together, they present a genuine issue of material fact as to whether counsel performed ineffectively.

C. Failure to provide effective assistance under Ake v. Oklahoma

In Ake v. Oklahoma, the Supreme Court held that a defendant in a capital case must have the assistance of a competent, effective and independent mental health expert. Ake v. Oklahoma, 470 U.S. 68 (1985). Respondent correctly notes that Petitioner has procedurally defaulted on this claim because it was never raised on direct appeal. Petitioner claims that this claim is reviewable under Sawyer v. Whitley, 505 U.S. 333 (1992). Under Sawyer, a federal habeas petitioner may "pass through the gateway" and argue the merits of an otherwise defaulted constitutional claim arising out of an error at sentencing if the petitioner can demonstrate by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law. Id. Petitioner argues that a competent and effective mental health expert could have made "a persuasive case to defeat the finding of future dangerousness." The Court finds that Petitioner does not meet the Sawyer test. Petitioner was evaluated by a social worker, Dr. Warren who his counsel chose

not to call. Furthermore, the Commonwealth presented much evidence on the question of future dangerousness, and it would be impossible for Petitioner to demonstrate by clear and convincing evidence that an independent mental health expert testimony would have prevented any reasonable juror from finding him eligible for the death penalty.

D. The death sentence was arbitrary capricious and disproportionate.

Petitioner argues that his sentence should be overturned because it is "excessive and disproportionate." Respondent contends that this claim is procedurally barred under Slayton v. Parrigan, 205 S.E.2d 680 (1974). The problem with Respondent's position, however, is that Petitioner could not argue that his sentence was disproportionate based on the evidence brought out in Henderson's trial until that trial took place. Thus, he could not argue this claim on direct appeal. The Court finds that this claim is not procedurally defaulted. The evidence at Henderson's trial including his admission that he committed the murder provides a basis for a hearing that Strickler's sentence was disproportionate to the crime.

E. Improper Jury instructions violated Strickler's Sixth, Eighth and Fourteenth Amendment rights.

Petitioner alleges that various jury instructions by the state court provide a basis for habeas relief. The Court finds that the jury instructions do not alone provide a basis for relief. The state court's burden shifting instruction on malice does not rise to the level of a constitutional violation. In Peterson v. Murray, 904 F.2d 882 (4th Cir. 1990) the Fourth Circuit found the exact same instruction permissible. The failure to instruct on mitigating circumstances and the state court's instruction on an improper predicate are procedurally barred. Strickler argues that trial counsel's failure to object constitutes cause and prejudice for the default. The Court does not find that trial counsel's failure to object to two instructions undermines confidence in the verdict sufficient to meet the cause and prejudice standard.

F. Trial court's failure to allow counsel to ask or inform jurors about parole

Strickler argues that this failure to inform jurors about his parole ineligibility violates the Eight Amendment's requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death] penalty." McCleskey v. Kemp, 481 U.S. 279, 306 (1987). In Skipper v. South Carolina, 476 U.S. 1 (1986) the Supreme Court held that mitigating evidence should be

defined broadly; its definition would include evidence of parole ineligibility. The Court does not dismiss the claim.

G. Trial court erroneously limited voir dire about juror's ability to show mercy and thus follow their oaths as jurors in considering a life sentence.

The trial transcript reveals that Petitioner's counsel conducted extensive voir dire of the jurors. The trial court prohibited counsel from asking one question about mercy. The Court finds that the inability to present this one question to the jurors does not constitute a constitutional violation. Therefore, this claim is dismissed.

H. Trial judge's refusal to qualify jurors Almarode and Wills.

Juror Wills stated that he could not impose the death penalty under any circumstances; thus he was properly barred from serving on the jury. Similarly, juror Almarode said that she could not vote to convict if she knew there was a possibility that Petitioner would receive the death sentence. The Court finds that the trial judge properly refused to qualify these jurors based on their opposition to the death penalty and dismisses this claim.

I. Refusal to excuse for cause jurors Ramsey and Brooks

The Virginia Supreme Court found that these two jurors were

impartial. The Fourth Circuit in Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995) found that such a determination is entitled to federal court deference. The Supreme Court of Virginia found ample evidence existed to support the trial judge's determination of impartiality and this Court defers to its ruling. This claim must be dismissed.

J. Violation of Strickler's Sixth, Eighth and Fourteenth amendment rights when Commonwealth withheld exculpatory evidence.

Petitioner contends that the Commonwealth withheld exculpatory impeachment evidence about Ann Stolzfus and Donna Tudor. The Commonwealth failed to disclose interviews and letters of Stoltzfus that contradicted and impeached her trial testimony. In her initial police interviews and subsequent letters to the police, Stolzfus could not identify Strickler as the man she saw in the car at the mall, could not identify Whitlock, and only described Whitlock's car and license plate number after viewing the seized vehicle at the police impound lot.

Respondent argues that this claim is procedurally barred. Petitioner states that the Court can hear his claim because his trial counsel's ineffectiveness for failing to file a Brady claim constitutes cause and prejudice for his default. "An attorney's effectiveness may constitute cause for excusing a procedural default when a petitioner has a constitutional right to effective

assistance of counsel and when that assistance is constitutionally ineffective under the standard established in Strickland v. Washington." Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994). The Court finds that the failure of Strickler's trial counsel to pursue a Brady motion constitutes cause for the default. Since Stoltzfus was the main witness to place Strickler at the mall and with Whitlock, his inability to use impeachment material prejudiced him. Accordingly, the Court grants him an evidentiary hearing on his claims.

Petitioner also claims that the Commonwealth withheld impeachment testimony about Tudor. Tudor's first comments to the police fail to mention all the incriminating details about Strickler that she testified to during trial. Petitioner alleges that Tudor had a motive to fabricate her testimony in exchange for immunity on a pending grand larceny charge. Respondent claims that this claim is also procedurally barred; Petitioner asserts the same cause and prejudice argument he made about Stolzfus. The Court does not believe that Tudor's inconsistencies truly prejudiced Strickler, thus it believes the claim is procedurally defaulted.

K. Prosecutor knowingly presented false evidence at trial.

Petitioner argues that the prosecution knew that Stoltzfus manufactured her testimony and thus by allowing her testify they

permitted false testimony to be presented in court. Petitioner does not allege that the prosecution knowingly allowed Stoltzfus to lie on the stand. Instead, he is suggesting that since her testimony changed over time, prosecutors knew that her trial testimony could not be true. While the Court believes there may be some merit to the suppression of this impeachment testimony, it does not believe it rises to prosecutorial misconduct as alleged here. This claim must be dismissed and the Court need not reach the procedural default issue.

L. Right to fair trial

This claim has no merit. The prosecution must present the best case it can. The cases Strickler cites in support of this claim describe much more egregious behavior than the behavior at issue here. For the Henderson and Strickler trials, the prosecution was just adopting different trial strategies based on the different cases it had to prove. Such actions do not constitute a constitutional violation.

M. Strickler actually innocent of the crime and sentence

Respondent states that this claim is procedurally barred. Petitioner claims that actual innocence overcomes procedural default under Schlup and Sawyer. While these two do support a "loop hole" for actual innocence, they establish a very strict

standard that is rarely met. In Schlup, the Supreme Court held that for a habeas petitioner to pass through the "gateway" and have the federal habeas court reach the merits of his defaulted claims: "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 867.

Petitioner presents new evidence which he claims shows his innocence. He submits the sworn testimony of Jeffrey Woods at Henderson's trial that Henderson admitted he, not Strickler, dropped the rock on Whitlock. He additionally states that Henderson's hair samples were like the hairs recovered from various clothing found at the scene. Henderson's PGM subtype was consistent with that found in vaginal and rectal swabs taken from the victim. Lastly, forensic evidence developed since Strickler's trial indicates that Whitlock probably died of strangulation and not from head injuries.

Petitioner's new evidence does not meet the Schlup standard. Petitioner's evidence only goes to the question of who actually committed the murder. Balanced against the new evidence that points to Henderson's guilt, is the evidence presented by the Commonwealth at Strickler's trial. An eyewitness saw Strickler abduct the victim, his shirt contained traces of human blood and semen, semen was found in the victim's body; Strickler's hair was found near the victim's body, he retained possession of the

victim's credit cards, he took her car and made statements about kicking the victim in the head and being a "rock crusher." Thus this new evidence does not make it more likely than not that a reasonable juror would conclude that Strickler was not guilty. The Court will dismiss this claim.

N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty.

Respondent states that this claim is procedurally defaulted under Slayton v. Parrigan. As Petitioner correctly points out, however, he could not have pointed out errors in the appellate process until the appellate process was over. He argues that the Virginia Supreme Court failed to compare cases where the defendants received life with those cases where the defendants received death. He also argues that the court failed to compare mitigation evidence in various cases; lastly, Strickler argues that the court's review relied on incorrect statements of evidence at trial. Petitioner brought this claim up on state habeas which was his first opportunity to challenge the Virginia Supreme Court's actions. This claim is properly before the Court, and the Court will grant Petitioner an evidentiary hearing on the claim.

O) Strickler's rights under the Sixth, Eight, and Fourteenth

Amendments were deprived by the prosecutor's improper comments in opening and closing arguments.

The Court agrees with respondent that this claim is procedurally barred under Slayton.

P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Respondent argues that this claim is procedurally defaulted. Petitioner argues that the claim is reviewable under Sawyer v. Whitley. Sawyer requires a petitioner to prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty. The jury relied on numerous pieces of evidence to find Strickler eligible for the death penalty. They looked at his behavior before, during and after the killing of Whitlock as well as his continuing criminal activity. Assuming arguendo that the Commonwealth did improperly introduce Strickler's conviction, the jury still had sufficient other evidence to support its finding of future dangerousness. The Court dismisses this claim.

Q) The death penalty is cruel and unusual and therefore unconstitutional.

The Court dismisses this claim because it is without merit. See Gregg v. Georgia, 428 U.S. 153 (1976) (when proportional to the severity of the crime and not a wanton infliction of pain the

death penalty is constitutional)

R) Vileness and Future Dangerousness under the Virginia Death Penalty statute are unconstitutionally vague.

In this claim, the Petitioner asserts that the "future dangerousness" aggravating factor under Virginia law is unconstitutionally unreliable and vague. Respondent correctly notes that Petitioner has procedurally defaulted on this claim.

Petitioner purports to evade the procedural default by arguing that the claim is reviewable under Schlup and Sawyer. The Court concludes that this claim does not meet this standard and is dismissed.

S) Evidence was insufficient to establish either future dangerousness or vileness

This claim is similar to the insufficiency of the evidence argument raised in claim A. The Court will grant an evidentiary hearing on this claim.

T) Juror misconduct

Respondent correctly notes that this claim is procedurally barred. Petitioner contends that he met the procedural hurdle by raising the claim in his state habeas. Since he did not, however, raise it on direct appeal, the Court finds this claim barred under Slayton.

U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution.

This claim survives the motion to dismiss and the Court will grant an evidentiary hearing on those matters it has not ruled are procedurally barred.

V) Ineffective Assistance of Appellate Counsel

In Claim V the Petitioner asserts that he was rendered ineffective assistance of appellate counsel because he did not receive an accurate record of the proceedings. The Court finds that this claim is not procedurally defaulted, but that it lacks merit. Accordingly, the claim must be dismissed.

An appropriate order will follow

Robert G. Doumar, Sr.
UNITED STATES DISTRICT JUDGE

DEC 10 1996
DATE

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
JAN 16 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN

Respondent.

Civil Action
No. 3:95CV924

RECEIVED
JAN 17 1997

ORDER

The Court is in receipt of Respondent's motion to alter or amend its judgment of December 10, 1996. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is ADJUDGED and ORDERED that the Court grants respondent's motion with respect to claims A,D,F,N, and S.

The Court grants an evidentiary hearing on petitioner's claims B,J, and U.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

Jan. 16, 1997
DATE

65

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILE
JAN 16 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN

Respondent.

Civil Action
No. 3:95CV924

MEMORANDUM

The Court is in receipt of respondent's motion to alter or amend its judgment of December 10, 1996. In its Order, this Court granted petitioner an evidentiary hearing on claims A,B,D,F,J,N,S, and U. Respondent contends that these claims either have no merit as a matter of law, fail to raise a cognizable federal issue or raise only pure legal issues for which an evidentiary hearing is unnecessary.

Claims A and S: Sufficiency of the Evidence to Prove Capital Murder, Vileness and Future Dangerousness

Upon reconsideration, the Court will dismiss these two claims as lacking merit. After further examination of the record, there is enough evidence to support the jury's determination that Strickler committed the capital murder. The Commonwealth presented testimony and evidence that Strickler was

present at the murder scene; his shirt contained traces of human blood and semen; his hair was found near the victim's body; he stole the victim's car and credit cards; he made statements about kicking the victim in the head and being a "rock crusher." The jury had enough evidence to support its finding that Strickler alone committed the murders.

The evidence on the record also supports a jury's determination that Strickler jointly participated in the killings and thus his conviction for capital murder is permissible under Virginia's "triggerman" rule. It was reasonable for the jury to conclude that the victim was bludgeoned to death and not strangled; the evidence about the rock's weight and that one man was needed to hold Whitlock down supports a finding that two men were needed to accomplish the act.

Similarly, the jury's determination of vileness and future dangerousness is also reasonable and supported by the record. Accordingly, the Court will dismiss these two claims.

Claim B. Ineffective Assistance of Counsel

The Court reaffirms its grant of an evidentiary hearing to the petitioner on this issue. Petitioner has not had a hearing on this issue in state court, and thus he has never had the opportunity to fully develop his claim. Petitioner has alleged numerous new facts in support of his ineffectiveness claim, and

pursuant to 28 U.S.C. § 2254(d) and Townsend v. Sain, 372 U.S. 293 (1963), this Court may grant him a hearing to develop his claim.

Claim D. Arbitrary, Capricious, and Disproportionate Death Sentence

The Court will dismiss this claim because it is essentially a proportionality claim. While Pulley v. Harris, 465 U.S. 37 (1984) does not ban all proportionality claims, in the case at bar, Strickler has not presented a constitutional claim.

Claim F. The Meaning of Parole and a Life Sentence

Contrary to respondent's contention, this claim[1] is not procedurally barred. Petitioner raised it on direct appeal and on state habeas. The Court, however, believes that the information Petitioner sought to present to the jury does not constitute a constitutional violation of the Supreme Court's requirement that sentencing authorities consider all mitigating evidence. See McClesky v. Kemp, 481 U.S. 279 (1987). The Court will deny an evidentiary hearing on this issue because this claim seeks an impermissible retroactive application of a new rule.

[1]The Court understands that Petitioner's claim is not that he is "parole ineligible," but rather that he should have been able to inform jurors that no one who has been convicted of capital murder but sentenced to life imprisonment has ever been released on parole. Petitioner also argues that he was not able to ask jurors what a life sentence actually meant to them.

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Petitioner's claims is analogous to Simmons v. South Carolina, 114 S.Ct. 2187 (1994)(Capital defendant allowed to rebut evidence of future dangerousness with proof of parole ineligibility.). The Fourth Circuit in O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996) held that the Simmons holding was a new rule that could not be applied retroactively.[2] Accordingly, the Court will dismiss this claim.

Claim J. The Commonwealth Withheld Exculpatory Evidence

The Court affirms its grant of an evidentiary hearing on the prosecution's failure to disclose exculpatory and impeachment evidence concerning witness, Ann Stoltzfus. Petitioner has demonstrated cause for his failure to raise this claim earlier. Defense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings.

Claim N. Inadequate and Meaningless Appellate Review

The Court will dismiss this claim. Petitioner challenges the appellate review in his own case. His claim, however, is procedurally defaulted because he did not raise it in his petition for rehearing before the Virginia Supreme Court.

[2] The Court is aware, however, that the Supreme Court has granted review in O'Dell on this issue of whether Simmons constitutes a new rule. O'Dell v. Netherland, __S.Ct.__, 1996 WL 716301 (12/19/96.).

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Claim U. Denial of the Right to a Fair Trial

The Court has ordering a hearing on a several claims dealing with trial errors. Given their nexus to this claim, the Court will deny the motion to dismiss Claim U and allow a hearing to proceed.

The Court will dismiss claims A,D,F,N, and S. An appropriate Order will follow.

UNITED STATES DISTRICT JUDGE

January 16, 1997

DATE

000534

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT 15 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN,

Respondent.

Civil Action
No. 3:95CV924

FINAL ORDER

For the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that Petitioner's Motion For Summary Judgment On Claim J (Brady violation) And Claim U (denial of fair trial) is GRANTED, thereby nullifying Petitioner's convictions of September 19, 1990 and the sentences imposed thereon. Respondent's Motion for Summary Judgment is DENIED.

Let the Clerk send copies of this Order and accompanying Memorandum to all counsel of record.

/s/ Richard L. Williams

OCT 15 1997

UNITED STATES DISTRICT JUDGE

DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT 15 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN,

Respondent.

Civil Action
No. 3:95CV924

MEMORANDUM OPINION

The crime giving rise to the instant proceedings occurred on January 5, 1990. The evidence at trial, in a brief summary, was as follows:

The victim, Leanne Whitlock, a young woman, while driving a friend's automobile, had driven to a shopping mall in Harrisonburg, Virginia at approximately 6:45 p.m. While the vehicle was stopped, a man ran from the shopping section of the mall and forced his way into the vehicle which the victim was operating. She drove off an sounded blasts of the horn while the intruder struck her repeatedly. She stopped the vehicle, and a second man, accompanied by a blond-haired woman, allegedly entered the car. Ms. Whitlock drove the car away, and her nude body was discovered five or six days later.

The issue before the Court deals primarily with the predicate

acts leading to the death sentence rendered against the Petitioner.

By agreement of Counsel for the Petitioner and Counsel for the Respondent, the issue of ineffective counsel, as contended in Claim B of the Amended Petition, has been withdrawn, leaving for the Court's determination, on the agreed pleadings, the claims in Claims J and U described in the following paragraphs.

On September 19, 1990, the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254, Strickler filed a Petition and an Amended Petition seeking a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. The matter comes before the Court on the cross-motions of Petitioner and Respondent for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motions have been fully briefed by the parties and are ripe for decision.

BACKGROUND

Charges against Strickler were first brought in Rockingham County in January 1990, and the case was later transferred to Augusta County when a capital indictment was returned in April, 1990. Strickler was tried by a jury before the Circuit Court of Augusta County (J. Wood) and found guilty of capital murder, robbery, and abduction. On June 21, 1990, the jury recommended

two life terms on the robbery and abduction charges and death for the capital murder charge. On September 19, 1990, the judge followed the recommendation of the jury sentence in the sentencing hearing.

By Orders dated December 10, 1996 and January 16, 1997, for reasons set out in Memoranda of the same dates, the Court granted Strickler an evidentiary hearing on Claim B alleging ineffective assistance of trial counsel, on Claim J alleging that the Commonwealth withheld exculpatory and impeachment material ("Brady" material) on a chief prosecution witness, Ann Stoltzfus, and on Claim U alleging that the cumulative effect of constitutional errors at trial violated Strickler's right to a fair trial.

STANDARD

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Allstate Fin. Corp. v. Financorp, Inc., 934 F.2d 55, 58 (4th Cir. 1991). The

moving party has the initial burden of establishing the absence of a genuine issue of fact.[1] Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. Anderson, 477 U.S. at 255; Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1004 (4th Cir. 1987).

Once the movant has met this burden, and a properly supported motion is before the Court, the non-moving party must set forth specific facts showing that there is a genuine issue for trial in order to defeat the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Allstate,

[1] "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248. "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." Ross Communications v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). Where no genuine issue of material fact exists, the Fourth Circuit has imposed an obligation on the trial judge "to prevent 'factually unsupported claims and defenses' from proceeding to trial." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

934 F.2d at 58. Summary judgment is proper if, based on the evidence, "a reasonable jury could [not] return a verdict for the non-moving party." Anderson, 477 U.S. at 248; Allstate, 934 F.2d at 58.

ANALYSIS

Pursuant to a subpoena obtained by Petitioner to develop his federal habeas case, Strickler obtained copies of Detective Claytor's notes and interview reports as well as copies of materials sent to the Detective by Anne Stoltzfus. Early in the investigation, Claytor conducted several interviews with Stoltzfus. Claytor took notes of those interviews, prepared formal reports of the interviews, and received letters and notes from Stoltzfus. See Claytor's Response (4/22/97), Attachment 1 to Motion for Summary Judgment. These materials are referred to herein as "the Stoltzfus materials."[2] Stoltzfus subsequently testified at Strickler's June 1990 trial that she had witnessed the abduction of the victim, Whitlock, from a Harrisonburg shopping mall. According to the prosecutor, Stoltzfus was the only eyewitness to the alleged abduction.

[2] The documents at issue ("the Stoltzfus materials") are attached as Exhibits 1-8 to the affidavits of William Bobbitt and Humes Franklin filed with Petitioner's Summary Judgment Motion.

Exculpatory and Impeachment Material in the Stoltzfus Materials

The notes, letters, and interviews of Stoltzfus contradicted or impeached her trial testimony in many crucial respects. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman that she said she saw in the car at the time of the alleged abduction, and Stoltzfus provided no description of the woman's clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this fact is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [the victim's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as appearing to be "a rich college kid," "singing" and "happy." Transcript of June 18 - 21, 1990 Trial ("Tr.") 483. Stoltzfus described the clothing Whitlock was wearing. These inconsistencies were extremely material for cross-examination.

When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but

felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could not positively identify Strickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr. 501. Stoltzfus was also unable to make a positive identification of Henderson (said to have been with Strickler at the time of the alleged abduction) from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews appear to have been contradictory to this testimony.

In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She

also gave a detailed description of the physical features and clothing of the white woman allegedly accompanying them. Ex. 7.

Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me job my memory.

Not only does this letter provide impeachment material, it provides a basis for which Stoltzfus's testimony might have been excluded altogether. She admits that she did not recall being at the mall on January 5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor information that never appeared in any of his notes, i.e., that she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information, at a minimum, would likely have been extremely valuable in attacking her credibility with the jury, if counsel were not successful in actually barring her testimony altogether.

Claytor's handwritten notes of January 19, 1990 contain no

mention of Stoltzfus's described encounter with Strickler and Henderson in a music store in the mall. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and a white woman inside the mall. The woman, according to the report, bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her alleged encounter in a music store with Strickler and Henderson. Stoltzfus subsequently gave this testimony at trial. In the January 22 letter, Stoltzfus stated she was uncertain that the man she saw in the mall was even the same man that she later testified she saw approach Whitlock's car. ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

(emphasis added). The letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall

because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(emphasis added). Once again Stoltzfus appeared to have admitted that she had not remembered being in the mall that night. Her "memory" appears to be based on what her daughter had told her.

A letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm not sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make.

(emphasis added). Stoltzfus' memory of the events to which she testified appears to be muddled at best. Strickler likely could have utilized that in an effort to convince the jury that Stoltzfus' story was concocted with the assistance of the police, after viewing the evidence and photographs, after hearing discussions of the crime on campus, and perhaps influenced by the pervasive news coverage of Whitlock's murder. As the Supreme Court has noted, the evolution of a witness' description over a period of time can be fatal to its reliability. See Kyles v. Whitley, 514 U.S. 419, 444 (1995).

A plethora of additional impeachment material is contained in the Stoltzfus materials which is not set forth here. The Court has discussed herein several of the documents that appear to be genuinely in dispute (Exhibits 2, 7, and 8) because it is necessary to refer to them to point out contradictions with Stoltzfus' other statements in the documents about which there is no genuine material dispute (Exhibits 1 and 3-6). However, even if the three documents that are in dispute were provided to Strickler's trial counsel, the other five documents that are not in dispute in the Court's view are sufficient to constitute a Brady violation and support the instant motion for summary judgment. The five documents containing the Stoltzfus' letters and notes to Det. Claytor provided potentially devastating impeachment material, casting doubt on her testimony.

Materiality of the Stoltzfus Materials

Respondent argues unsuccessfully that the suppressed documents were not "material" under Brady and therefore, the prosecutor had no obligation to disclose them to defense counsel. The Commonwealth's Attorney's argument on summation at Strickler's trial refutes this. The prosecutor argued that Stoltzfus' testimony established both the abduction predicate and the armed robbery predicate for the capital murder count:

> First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfus [sic] says that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then drove off with Ms. Whitlock. She was brought here to Augusta County where she was detailed, where she was taken by abduction. Absolutely no issue about that.

Tr. at 794.

* * *

> And we are lucky enough to have an eyewitness who saw what happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stoltzfus was there, she saw what happened.

Tr. at 799. The Commonwealth's Attorney then repeated Stoltzfus' testimony in detail. (Tr. 799-801). He argued to the jury based on Stoltzfus' testimony that Strickler had a knife and that he held it against Whitlock as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him al the time. He had a knife later on with him in the car. <u>That was pressed right up against Leanne.</u> ... Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

Tr. 800-01 (emphasis added).

Stoltzfus described Strickler alone as committing violent acts against Whitlock-- he forced his way into her car and struck her repeatedly. In this way, the Commonwealth's Attorney used

Stoltzfus to prove that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. No other witness placed Strickler in the vicinity of Whitlock, her car, or the parking lot during the time period in which Whitlock was believed to have been at the mall. Despite widespread publicity about Whitlock's case, no other witness came forward to report the very public events that Stoltzfus claims to have witnessed. Stoltzfus was the critical witness on the abduction count.

Likewise, no other witness saw Strickler with a knife or any other weapon when at the mall. Stoltzfus herself never testified that Strickler had a knife when he was in the mall or allegedly in the car with Whitlock. That inference was provided by the prosecutor based on Stoltzfus' claim that Whitlock looked down while Strickler sat beside her in the car. Again, Stoltzfus was the critical witness for the armed robbery predicate based on what she "observed" in the parking lot. Thus, as the Commonwealth's Attorney recognized, Stoltzfus's testimony played a central role in Strickler's conviction and portrayed Strickler, rather than Henderson, as the leader and instigator in the violent abduction and robbery. Without Stoltzfus' testimony, which appears likely to be less certain than she portrayed, the

jury may well have been reduced to speculation concerning these events and concerning the role played by Strickler. The jury could have found Henderson as the leader and instigator instead of Strickler.

Respondent relies on evidence that Strickler had Whitlock's car and possessions sometime after Stoltzfus "witnessed" the alleged abduction and armed robbery to establish that the suppressed Brady materials could not undermine confidence in the outcome of the trial. This argument ignores substantial evidence that could have led a jury to believe that Henderson, rather than Strickler, was the ring-leader in Whitlock's abduction, robbery, and death. Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans.[1] Thus,

[1]At Henderson's trial, the Commonwealth called this friend as its own witness to establish Henderson's guilt.

Stoltzfus' testimony was not irrelevant to Strickler's conviction as Respondent maintains.

Without Stoltzfus' testimony, the jury could have concluded that Henderson was responsible for the abduction, robbery, and murder, and that Strickler was an accessory after the fact or a principal in the second degree but not a principal in the first degree to capital murder. The court had charged the jury on the offense of first degree murder. Conviction of a lesser offense was a reasonable probability if defense counsel had been given the Stoltzfus materials. Given that Stoltzfus initially did not even remember being at the mall on the night Whitlock was abducted, was later unsure whether the man she saw in the mall was the same one who approached Whitlock's car, and the large amount of impeachment material contained in the Stoltzfus materials, Strickler has satisfied the materiality requirement under Brady and Kyles. The undisclosed evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). As Kyles emphasized, materiality does not require proof that the defendant would be acquitted or that the evidence was insufficient absent the Brady violation. A reasonable probability of conviction on a lesser count satisfies the Brady standard.

Respondent's Duty to Disclose the Stoltzfus Materials

Exculpatory and impeachment material that is in the possession and control of the state must be disclosed to the defendant prior to trial. See generally, Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963). Respondent fails to offer a single piece of evidence to rebut Strickler's contention that his trial counsel was never provided with Exhibits 1, 3, 4, 5, and 6. Instead, Respondent argues that under Brady, the Commonwealth is required to disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation. See Barnes v. Thompson, 58 F.3d 971, 975-77 (4th Cir. 1995), cert. denied, 116 S. Ct. 4351 (1995). Respondent claims that there is no Brady violation if the information lies in a source where a reasonable defendant would have looked, Barnes, 58 F.3d at 975, and argues that the extent of Strickler's investigation at trial is an unresolved factual issue. Respondent further states that the Stoltzfus materials were available to Strickler because he had notice shortly before the June 1990 trial that Stoltzfus would be a witness.

The Court disagrees. Even though the identity of the

witness was known to the defendant before trial, the Stoltzfus materials were not available to the defense because they were not in a public file until subpoenaed during federal habeas proceedings. See Kyles v. Whitley, 514 U.S. 419 (1995) (holding that prosecutor violated Brady and noting that investigatory interviews are not available to defendant, even when names of witnesses and their testimony are known to defense); United States v. Kelly, 35 F.3d 929 (4th Cir. 1994) (reversing conviction and ordering new trial where impeachment material was not in public file and rejecting argument that evidence was available to defense with reasonable diligence).

Respondent's Failure To Disclose the Stoltzfus Materials

Augusta Commonwealth's Attorney Ervin prosecuted Strickler. Ervin had an open file policy such that Strickler's trial counsel, William E. Bobbitt, Jr., had full access to the prosecution's files. Both Bobbitt and co-defendant Henderson's defense counsel, Humes Franklin, have submitted affidavits stating that none of the Stoltzfus materials were in the prosecutor's open files which both defense attorneys reviewed in preparing their respective cases, and that they were not aware of the existence of these materials until 1997. See Bobbitt Affidavit (8/19/97), Attachment 2 to Petitioner's Motion For

Summary Judgment; Franklin Affidavit (9/5/97), Attachment 3 to Petitioner's Reply To The Warden's Response In Opposition To Strickler's Motion For Summary Judgment.

Of the eight Exhibits that comprise the Stoltzfus materials, Commonwealth Attorney Ervin only recalls reviewing Exhibits 2, 7, and 8 before Strickler's trial. He states that those three documents were in his open prosecution file and thus were accessible to defense counsel. However, Ervin does not remember reviewing Exhibits 1 or 3-6 prior to or during Strickler's trial. See Ervin Affidavit, Attachment 6 to Petitioner's Supplemental Memorandum In Further Support Of His Motion For Summary Judgment. Detective Claytor states via affidavit that he recalls distributing his typed report, Exhibit 2, to the Rockingham prosecutor but does not recall distributing any of the other materials prior to or during Strickler's trial. He only recalls producing those documents in response to the subpoena requested by Strickler's current federal habeas counsel. It appears that Strickler's trial counsel, his co-defendant Henderson's trial counsel, and the prosecutor all saw Exhibits 1 and 3-6 for the first time when Det. Claytor produced them from his private files to comply with the federal subpoena.

Respondent produced no evidence that Strickler was provided

with Exhibits 1 or 3-6 of the Stoltzfus materials until four working days before the scheduled evidentiary hearing and several weeks after briefing on the cross-motions for summary judgment had been completed, at which time Respondent submitted a one paragraph affidavit by Bobbitt's co-counsel, Thomas E. Roberts, and a newspaper article. Roberts states by affidavit that he cannot recall seeing any of the Stoltzfus materials, but remembers the information contained in them. He further states that he remembers "discussing with Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time." Roberts Affidavit.

The Court is somewhat skeptical about the accuracy of Roberts affidavit statements. The prosecutor, lead defense counsel for Strickler, and lead defense counsel for co-defendant Henderson all stated by affidavit that they did not see Exhibits 1 or 3-6 of the Stoltzfus materials before or during their respective trials. Roberts has failed to account for how he, unlike all the other participants in these trials, became aware of the plethora of information and impeachment material contained in the Stoltzfus documents. If Roberts was aware of the information contained in the Stoltzfus documents, one wonders why

he and Bobbitt would have chosen not to use such powerful impeachment material on cross-examination to cast doubt on the credibility of Stoltzfus, a crucial witness for the Commonwealth.

Despite the Court's skepticism regarding the accuracy of Roberts' affidavit statements, the Court nonetheless accepts Roberts' recollections as accurate and true for the purposes of summary judgment. Even accepting Roberts' statements as accurate and truthful, they are much too vague and insufficient to create a genuine dispute that Exhibits 1, 3, 4, 5, and 6 of the Stoltzfus materials were disclosed to defense counsel in light of all of the evidence to the contrary provided by Strickler and cited herein. The only specific details Mr. Roberts recalls as impeaching Stoltzfus' testimony is that her story evolved over time and that she had not come forward immediately. Those details are but a portion of the contradictions and discrepancies found within the Stoltzfus materials which have been recounted only in part herein.

The Respondent also submitted a newspaper article from the "Roanoke Times & World-News" dated Sunday, June 17, 1990, the day before Strickler's trial began, and contends that this article contains all of the facts that Strickler claims were wrongfully withheld from him in violation of Brady. The Court disagrees

with Respondent. This article does include some information that was also included in the Stoltzfus materials. For example, the article states that the individual interviewed, who appears to be Stoltzfus, at some point looked at pictures of Whitlock with John Dean, Whitlock's boyfriend, although it is not clear from the article whether this occurred before or after Stoltzfus identified Strickler. The article has a few details that might have been helpful to Strickler if he did not already know them. Besides these few details, however, the article contains virtually none of the information contained in the Stoltzfus materials and certainly did not relieve the Commonwealth from the burden of providing the Stoltzfus materials to Strickler. Respondent has not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation. A newspaper article which may not have been seen by defense counsel simply does not equate to a prosecutor's obligation under the law.

Thus, the evidence produced by Respondent, viewed in the light most favorable to Respondent, is insufficient to create a genuine factual dispute as to whether the Commonwealth ever provided Exhibits 1, 3, 4, 5, or 6 -- the majority of the

Stoltzfus materials -- to Strickler. The uncontradicted fact is that it had not. The Commonwealth had an affirmative duty to disclose those materials to Strickler's trial counsel because they contain exculpatory and impeachment material and are also "material" under Brady and its progeny.

CONCLUSION

Based on the materials disclosed pursuant to Court ordered discovery, the facts demonstrate that Exhibits 1 and 3-6 contained Brady material that was in the possession of the Harrisonburg police department, that the Brady material was not contained in the Augusta Commonwealth's Attorney's files, that Strickler's trial counsel reviewed the prosecutor's files pursuant to the "open file" policy, and that the relevant materials were not contained in the file. The pretrial motions and the trial transcript demonstrate the Commonwealth's Attorney's knowledge that several separate police departments and jurisdictions had been involved in the investigation of Strickler's case. The Commonwealth's Attorney called several of these officers as witnesses. He was clearly on notice that the files of these other agencies might contain material required to be disclosed to the defense attorney. Whether from good faith or bad, the effect is that these undisclosed materials were

suppressed by the prosecution and never disclosed to Strickler's trial attorney. For the foregoing reasons, the Court will DENY Respondent's motion, GRANT Petitioner's Motion for Summary Judgment on Claims J and U, thereby vacating Petitioner's conviction. An appropriate Order will enter.

OCT 15 1997

DATE

Robert E. Maxwell, J.
UNITED STATES DISTRICT JUDGE

EXHIBIT E

§ 2.1-342. **Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter.** — A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens

$200, the public body may, before continuing to process the request, require the citizen requesting the information to agree to payment of an amount not to exceed the advance determination by five percent. The period within which the public body must respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the citizen requesting the information.

Official records maintained by a public body on a computer or other electronic data processing system which are available to the public under the provisions of this chapter shall be made reasonably accessible to the public at reasonable cost.

Public bodies shall not be required to create or prepare a particular requested record if it does not already exist. Public bodies may, but shall not be required to, abstract or summarize information from official records or convert an official record available in one form into another form at the request of the citizen. The public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

Failure to make any response to a request for records shall be a violation of this chapter and deemed a denial of the request.

B. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of such photograph will no longer jeopardize the investigation; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; records of local police departments relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such departments under a promise of confidentiality; and all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of this chapter.

Criminal incident information relating to felony offenses shall not be excluded from the provisions of this chapter; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

§ 8.01-654.1. Limitation on consideration of petition filed by prisoner sentenced to death. — No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or(iii) the expiration of the period for filing a timely petition for certiorari without a petition being filed.

However, notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him. (1995, c. 503; 1998, c. 199.)

§ 8.01-654. When and by whom writ granted; what petition to contain. — A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124.)

§ 15.2-1722. Certain records to be kept by sheriffs and chiefs of police. — A. It shall be the duty of the sheriff or chief of police of every locality to insure, in addition to other records required by law, the maintenance of adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency. Failure of a sheriff or a chief of police to maintain such records or failure to relinquish such records to his successor in office shall constitute a misdemeanor. Former sheriffs or chiefs of police shall be allowed access to such files for preparation of a defense in any suit or action arising from the performance of their official duties as sheriff or chief of police. The enforcement of this section shall be the duty of the attorney for the Commonwealth of the county or city wherein the violation occurs. Except for information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, the records required to be maintained by this section shall be exempt from the provisions of Chapter 21 (§ 2.1-340 et seq.) of Title 2.1.

B. For purposes of this section, the following definitions shall apply:

"Arrest records" means a compilation of information, centrally maintained in law-enforcement custody, of any arrest or temporary detention of an individual, including the identity of the person arrested or detained, the nature of the arrest or detention, and the charge, if any.

"Investigative records" means the reports of any systematic inquiries or examinations into criminal or suspected criminal acts which have been committed, are being committed, or are about to be committed.

"Noncriminal incidents records" means compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths.

"Personnel records" means those records maintained on each and every individual employed by a law-enforcement agency which reflect personal data concerning the employee's age, length of service, amount of training, education, compensation level, and other pertinent personal information.

"Reportable incidents records" means a compilation of complaints received by a law-enforcement agency and action taken by the agency in response thereto. (1975, c. 290, § 15.1-135.1; 1979, c. 686; 1981, c. 284; 1997, c. 587.)

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, c. 636; 1983, c. 175; 1985, c. 428; 1988, c. 550; 1989, c. 527; 1990, c. 746; 1991, c. 232.)

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

Rule 3A:11. Discovery and Inspection.

(a) *Application of Rule.* — This Rule applies only to prosecution for a felony in a circuit court.

(b) *Discovery by the Accused.* — (1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

Rule 4:1. General Provisions Governing Discovery.

(a) *Discovery Methods.* — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Scope of Discovery.* — Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subject to the provisions of Rule 4:8 (g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).

(5) Limitations on Discovery in Certain Proceedings. In any proceeding (1) for separate maintenance, divorce, or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

CERTIFICATION

I hereby certify that two copies of the enclosed Petition For A Writ Of Certiorari were served by hand on counsel for Respondent, Pamela Rumpz, Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on Sept. 1, 1998.

BARBARA L. HARTUNG

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. Case No. CL 92000305

EDWARD W. MURRAY, et.al.

Respondents.

MOTION TO DISMISS

Now come the respondents, by counsel, and move this Court to deny and dismiss the petition for writ of habeas corpus.

PROCEDURAL HISTORY

Petitioner is being detained pursuant to judgments of this Court dated September 19, 1990, in which he was convicted of capital murder, abduction and robbery. Based on findings of both "vileness" and "future dangerousness," he was sentenced to death for capital murder. He was sentenced to life imprisonment for each of the non-capital felonies.

The Virginia Supreme Court unanimously affirmed petitioner's capital murder conviction and death sentence on April 19, 1991. The court also unanimously affirmed the remaining felony convictions. Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227 (1991). Strickler's petition for a writ of certiorari to the United States Supreme Court was denied on November 4, 1991. Strickler v. Virginia, 112 S. Ct. 386 (1991).

one of those selected had formed any opinion at all. (Tr. 119 [Hickox]). See Patton v. Youn 467 U.S. 1025, 1029-1030 (1984) (defendant not denied fair trial even where 77% of veniremc admitted they would carry an opinion into the jury box, and 8 out of 14 actually seated admitte they had formed an opinion as to defendant's guilt.) The record shows that there was simpl no need for either a change of venue or a change of venire.

Claim 2

The petitioner next claims that counsel were ineffective for failing to file a motion fo exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.[4]

From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed all the evidence the Commonwealth intended to present. Both attorneys were taken together to the crime scene, accompanied by the two prosecutors and the chief investigator, and shown the location of the evidence found there. No evidence was introduced at trial of which the petitioner's counsel had been previously unaware. (See Resp. Exh. 1, ¶ 3). Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.

In addition, counsel could have made a tactical decision not to file such a motion, because it would have made reciprocal discovery available to the Commonwealth under Rule 3A:11(c) of the Rules of the Supreme Court of Virginia. Counsel thus would have been

[4]Counsel did file a Motion for a Bill of Particulars, parts of which were denied on the grounds that the material requested was actually "discovery." (Tr. 7-8, 14, 18-21).

required to disclose any highly prejudicial information then known to them, e.g., the report of Dr. Warren. (See Resp. Exh. 6). Because the decision to forego a formal discovery motion could have been the result of reasonable trial strategy, the petitioner cannot show ineffectiveness under Strickland, 466 U.S. at 689; Darden, 477 U.S. at 186. Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can he show prejudice. This claim must therefore be denied and dismissed.

Claims 3 and 4

In these two claims, the petitioner alleges that counsel were ineffective for failing to question the venire about their racial attitudes in order to determine whether the veniremen would be inclined to impose the death penalty:

(a) to atone for the racism of whites and the past oppression of blacks (Claim 3), and

(b) to help equalize the imposition of death sentences for white and black defendants. (Claim 4).

In preparing for trial, counsel discussed and considered whether to ask the veniremen about possible racial bias. They chose not to make such inquiry for sound tactical reasons. They did not want to emphasize the fact that the victim was black and the petitioner was white because they did not want to either imply that the veniremen were biased, thereby alienating them, or to inadvertently suggest that the most severe punishment was appropriate because the crime was interracial. They could not conclude with any certainty what effect such questions

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APPENDIX F

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IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. Case No. CL 92000305

EDWARD W. MURRAY, et.al.

Respondents.

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Now come the respondents, by counsel, and move this Court to deny and dismiss the petition for writ of habeas corpus.

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one of those selected had formed any opinion at all. (Tr. 119 [Hickox]). See Patton v. Yount, 467 U.S. 1025, 1029-1030 (1984) (defendant not denied fair trial even where 77% of veniremen admitted they would carry an opinion into the jury box, and 8 out of 14 actually seated admitted they had formed an opinion as to defendant's guilt.) The record shows that there was simply no need for either a change of venue or a change of venire.

Claim 2

The petitioner next claims that counsel were ineffective for failing to file a motion for exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.[4]

From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed all the evidence the Commonwealth intended to present. Both attorneys were taken together to the crime scene, accompanied by the two prosecutors and the chief investigator, and shown the location of the evidence found there. No evidence was introduced at trial of which the petitioner's counsel had been previously unaware. (See Resp. Exh. 1, ¶ 3). Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.

In addition, counsel could have made a tactical decision not to file such a motion, because it would have made reciprocal discovery available to the Commonwealth under Rule 3A:11(c) of the Rules of the Supreme Court of Virginia. Counsel thus would have been

[4]Counsel did file a Motion for a Bill of Particulars, parts of which were denied on the grounds that the material requested was actually "discovery." (Tr. 7-8, 14, 18-21).

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	)	Case No. 3:95-CV-924

CITY OF STAUNTON
COUNTY OF AUGUSTA

AFFIDAVIT OF WILLIAM E. BOBBITT, JR.

William E. Bobbitt, Jr., being duly sworn, states as follows:

1. I am the Public Defender for Augusta and Rockbridge Counties and the cities of Staunton, Waynesboro, and Buena Vista. In that capacity, I was assigned to represent Tommy David Strickler in his capital murder trial in Augusta County.

2. The jury trial was conducted in June, 1990, in Augusta County. I was assisted by Thomas E. Roberts, then a part-time Assistant Public Defender.

3. Prior to trial, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County. The prosecutor had an open file policy, and I had access to these files on more than one occasion. I was permitted to make copies of any materials.

4. I have reviewed the attached Exhibits 1-7 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

5. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I do not have copies of any of the material contained in Exhibits 1-7.

6. I have reviewed my cross-examination of Anne Stoltzfus during Strickler's trial. My cross-examination questions do not rely on any of the materials in these exhibits. I conclude that none of these materials were in the Commonwealth's files when I examined them.

7. I first learned these materials existed when they were shown to me sometime in 1997.

8. The material in Exhibits 1-7 provides powerful impeachment material and should have been disclosed to me pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Kyles v. Whitley, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

9. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

10. The notes, letters and interviews of Anne

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Stoltzfus contradicted or impeached her trial testimony in a number of respects.

11. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman in the car at the mall, and Stoltzfus provided no description of her clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [Whitlock's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as "a rich college kid," "singing" and happy. Stoltzfus described the clothing she was wearing. These inconsistencies were material for cross-examination.

12. When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could not positively identify Stickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial

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testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr. 478-49. Stoltzfus was also unable to make a positive identification of Henderson from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews stated the opposite.

13. In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She also gave a detailed description of the physical features and clothing of the white woman accompanying them. Ex. 7.

14. Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of to all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Not only does this letter provide reams of impeachment material, it provides a basis to exclude Stoltzfus's testimony altogether. She admits that she did not recall being at the mall on January

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Not only does this letter provide reams of impeachment material, it provides a basis to exclude Stoltzfus's testimony altogether. She admits that she did not recall being at the mall on January

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5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor information that never appeared in any of his notes, i.e., she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information would have been very effective in destroying her credibility with the jury.

15. Claytor's handwritten notes of January 19, 1990, contain no mention of Stoltzfus's encounter with Strickler and Henderson in the music store. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and white women inside the mall. The woman bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her encounter in a music store with Strickler and Henderson. Stoltzfus later gave this testimony at trial. In the January 22 letter, Stoltzfus states she is uncertain that the man she saw in the mall is even the same man that she later saw approach Whitlock's car. Ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

(Emphasis added.)

e letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(Emphasis added.) Once again Stoltzfus admits that she had not remembered being in the mall that night. Her "memory" is based on what her daughter has told her. Stoltzfus's letters and notes to Det. Claytor provided devastating impeachment material, casting doubt on all of her testimony.

16. There are additional inconsistencies. In Stoltzfus's first police interview, Whitlock's car was described as "dark blue" with West Virginia tags. In notes labled "Observations" dated January 19, 1990, and illustrated with diagrams, the car is described as a "dark blue, 'new' sports car West Va. tags." Ex. 3.

17. On January 24, 1990, a police report indicates that Stoltzfus was taken to the police impound lot to view the car. Ex. 2. After viewing the car, she was able to recall the license number, NKA-243, and other details about the car.

18. The letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in

and talk to you, I never would have made any of the [illegible] associations that you helped me make.

(Emphasis added.) Stoltzfus did not remember the events that sh[illegible] testified about. Her story was apparently developed with the assistance of the police, after viewing the evidence and photographs, and after hearing discussions of the crime on campus.

19. Additional impeachment material is contained in [illegible] Exhibits 1-7 which is not set forth here.

20. In sum, the suppressed documents satisfy the requirements of Brady and Kyles for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether suppression of the evidence "undermines confidence in the outcome of the trial." Kyles, at 1566, quoting Bagley, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The [illegible] materials should have been disclosed to Strickler's trial counsel.

Further, affiant sayeth not.

William E. Bobbitt, Jr.

Sworn to before me this
19th the day of August, 1997:

Linda H. Majer, Notary Public
My Commission expires: July 31, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	)	Case No. 3:95-CV-924

CITY OF WAYNESBORO, VIRGINIA

AFFIDAVIT OF HUMES J. FRANKLIN, JR.

Humes J. Franklin, Jr., being duly sworn, states as follows:

1. I am an attorney, admitted to the Bar of Virginia, and my office is located at 129 N. Wayne Avenue, Waynesboro, Va.

2. In 1990, I was assigned to represent Ronald Lee Henderson in his capital murder trial. Henderson had been charged along with Tommy Strickler in the abduction, robbery and murder of Leeann Whitlock. The indictment was brought in Augusta County and subsequently transferred on defendant's motion to the Circuit Court for the City of Winchester.

3. The jury trial was conducted in March, 1991, before Judge Bumgardner. Henderson was convicted of first degree murder and sentenced to life imprisonment. The prosecutor was A. Lee Ervin, Commonwealth's Attorney for Augusta County. Ervin had prosecuted Strickler in 1990, and Strickler was convicted of capital murder and sentenced to death.

4. On February 7, 1991, I filed a Motion For Discovery And Inspection requesting in relevant part, "Any statements allegedly made by any person which show or tend to show any information within the knowledge of possession of the Commonwealth which tends to be exculpatory, mitigating, or otherwise favorable to the defendant," id. at ¶ B.1., as well as "Any and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence or which arguably could lead to such records or information," id. at ¶ 10.

5. The Commonwealth filed an Objection To Defendant's Motion For Discovery And Inspection on March 5, 1991. In response to B.1, the Commonwealth agreed "to provide any exculpatory evidence that it may have knowledge of." As to 10, the Commonwealth agreed to provide "any exculpatory evidence that is within the knowledge of the Commonwealth's Attorney."

6. On March 20, 1991, the trial court entered an Order directing in relevant part that the Commonwealth's Attorney "provide all exculpatory evidence that he has knowledge of to [Henderson]."

7. Pursuant to that Order and the Commonwealth's consent, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County prior to Henderson's trial. I had access to these files on more than one occasion, and I was permitted to make copies of any materials.

8. I have reviewed the attached Exhibits 1-8 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

9. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I ~~do~~ could not ~~have~~ find copies of any of the material contained in Exhibits 1-8.

10. I have reviewed my cross-examination of Anne Stoltzfus during Henderson's trial. Exhibit 9. My cross-examination questions do not rely on any of the materials in these exhibits. I ~~conclude~~ must presume that none of these materials were in the Commonwealth's files when I examined them.

11. To the best of my knowledge / I first learned these materials existed when they were shown to me sometime in 1997.

12. The material in Exhibits 1-8 provides powerful impeachment material and should have been disclosed to me pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Kyles v. Whitley, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

13. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler and Henderson on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

14. I believe The notes, letters and interviews of Anne Stoltzfus contradicted or impeached her trial testimony in many significant respects. The ~~undisclosed~~ materials also provided a basis to bar her testimony altogether since Stoltzfus stated that her "memories" were based on conversations with her daughter. Had I known of these materials, I would have made a motion in limine to prohibit Stoltzfus' testimony.

15. The ~~suppressed~~ documents satisfy the requirements of Brady and Kyles for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether ~~suppression~~ undisclosure of the evidence "undermines confidence in the outcome of the trial." Kyles, at 1566, quoting Bagley, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The materials should have been disclosed to me as Henderson's trial counsel.

Further, affiant sayeth not.

Humes J. Franklin, Jr.

Sworn to before me this
5th the day of September, 1997:

Ellen P Hunsard

My commission expires on: 9/30/99

EDITOR'S NOTE

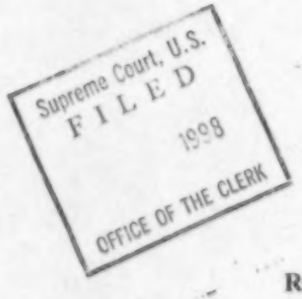
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No. 98-5864
A-186

(4)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997



TOMMY DAVID STRICKLER,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit and Application
for Stay of Execution

DIRECTOR'S BRIEF IN OPPOSITION

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59 pp

QUESTION PRESENTED

In a case where it is undisputed that the petitioner never raised his defaulted "exculpatory evidence" claim in state court, where the uncontradicted evidence established that at least one of the petitioner's trial attorneys was fully aware of the allegedly non-disclosed "exculpatory evidence" and, where the evidence in question is not material as a matter of law, should this Court grant certiorari to resolve a supposed split in circuits on whether there is a "due diligence" exception to the rule of Brady v. Maryland, 373 U.S. 83 (1963)?

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DIRECTOR'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Case History

On January 5, 1990, in Augusta County, Virginia, Tommy David Strickler abducted, brutally beat, raped and then murdered Leanne Whitlock by dropping a 69-pound boulder on her head four times, crushing her skull.

Strickler was convicted by a jury in Augusta County of the capital murder of Whitlock, abduction and robbery. After a separate sentencing proceeding, the jury fixed Strickler's punishment at death for the capital murder, finding both a probability that Strickler would constitute a continuing serious threat to society and that Strickler's conduct in committing the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery. See Va. Code § 19.2-264.4. After considering a post-sentencing report, as required by Virginia Code § 19.2-2 .5, the trial court imposed sentence in accordance with the jury's verdict on September 19, 1990. The Supreme Court of Virginia unanimously affirmed Strickler's convictions and sentences on April 19, 1991. Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227 (1991). This Court denied Strickler's petition for certiorari on November 4, 1991. Strickler v. Virginia, 502 U.S. 944 (1981).

On December 5, 1991, the Augusta County Circuit Court appointed counsel to represent Strickler in state habeas corpus proceedings. Nine months later, on or about September 1, 1992, Strickler filed a petition for a writ of habeas corpus in the Augusta Circuit Court. Strickler did not seek discovery in the state habeas court, see Rule 4:1(b)(5), Rules of the Supreme Court of Virginia, and his petition did not contain an "exculpatory evidence" claim. The Warden filed a motion to dismiss and, after oral argument, the petition was denied. Strickler's petition for appeal to the Virginia Supreme Court was granted, limited to his Assignment of Error No. 9.[1]

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[1] Assignment of Error 9 read:

> The trial court erred in not vacating the capital murder conviction despite its finding that Instruction 1 given at petitioner's trial was defective because of its inclusion in the definition of capital murder an underlying offense which does not by statute support a conviction of capital murder.

After full briefing and oral argument, the Virginia Supreme Court ultimately ruled that the substantive claim regarding the propriety of a jury instruction was barred under Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), because it had not been raised at trial and on direct appeal. Strickler's claim of ineffective assistance of counsel, based on the conduct complained of in Assignment of Error 9, was rejected under Strickland v. Washington, 466 U.S. 668 (1984). In light of the overwhelming evidence that Strickler murdered Whitlock during the commission of a robbery while armed with a deadly weapon, the Virginia Supreme Court concluded that Strickler had failed to demonstrate that he had been prejudiced by counsel's alleged error. Strickler v. Murray, 249 Va. 120, 452 S.E.2d 648 (1991). Strickler's subsequent petition for a writ of certiorari in this Court was denied on October 2, 1995. Strickler v. Angelone, 116 S.Ct. 146 (1995).

In March, 1996, Strickler filed a § 2254 petition in the United States District Court for the Eastern District of Virginia, and he amended his petition in May, 1996. The Warden filed a motion to dismiss in June, 1996.

On December 10, 1996, the district court dismissed the bulk of Strickler's claims but ordered an evidentiary hearing on eight remaining claims. In response to the Warden's motion to reconsider, the district court dismissed all of Strickler's claims except an exculpatory evidence claim, an "unfair trial claim" and numerous allegations of ineffective assistance of counsel. These remaining claims were set for an evidentiary hearing to begin on October 3, 1997. Well

before the evidentiary hearing, however, both parties filed motions for summary judgment, accompanied by supporting documents, on the exculpatory evidence and "unfair trial" claims.[2]

On October 2, 1997, the day before the scheduled hearing, the parties appeared before the district court. At that time, Strickler expressly withdrew, with prejudice, his allegations of ineffective assistance of counsel and asked the court to decide the exculpatory evidence/unfair trial claim on the cross-motions for summary judgment. Consequently, the district court canceled the evidentiary hearing with the agreement of both parties. On October 16, 1997, the district court granted Strickler's motion for summary judgment, denied the Warden's cross-motion for partial summary judgment and granted Strickler habeas corpus relief on his "exculpatory evidence" and "unfair trial" claims.

The Commonwealth appealed to the United States Court of Appeals for the Fourth Circuit. After full briefing and oral argument, the Fourth Circuit, in an unpublished per curiam opinion, reversed the district court's award of habeas corpus relief on June 17, 1998. Strickler v. Pruett, 1998 U.S. App. LEXIS 12805 (4th Cir. 1998). On July 15, 1998, the Fourth Circuit denied Strickler's petition for rehearing. Strickler's motion for stay of execution and motion to stay the Fourth Circuit's mandate were denied and the mandate issued on July 30, 1998.

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[2] The alleged exculpatory material in this case consists of eight items which, Strickler contends, could have been used to impeach Commonwealth's witness Anne Stolzfus. These documents were obtained by Strickler during discovery which he requested for the first time in the district court. Inexplicably, Strickler has failed to provide this Court with copies of the documents. They are included, however, in the Respondent's Appendix. (RA 2-20).

On July 23, 1998, pursuant to Virginia Code § 53.1-232.1, the state trial court set Strickler's execution for September 16, 1998.

2. Strickler's crimes.

The facts surrounding Strickler's murder of Leanne Whitlock were summarized by the Virginia Supreme Court as follows:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.
>
> Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.
>
> As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury that Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.
>
> Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Henderson handed his coat to Strickler, who put it on the floor of the car and "fiddled with it" for a long time. He then sat up, faced Leanne, and the other two sat back and relaxed. Mrs. Stolzfus drove up to the car and asked Leanne three times, "[A]re you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.
>
> About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,* and another man was in the back seat. Massie thought he saw a fourth occupant in the car.
>
> Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.
>
> At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head-on with an approaching car, and Strickler drew a knife and threatened to stab him.
>
> After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne

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* Leanne was black.

Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his bloodstained blue jeans and his shirt.

Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car behind Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs.

Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground.

> Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin, and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots.
>
> Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human bloodstains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

Strickler v. Commonwealth, 241 Va. 482, 485-488, 404 S.E.2d 227, 230-232 (1991). See 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (presumption of correctness applies to state appellate court's recitation of historical facts).

REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

I. STRICKLER'S "BRADY" CLAIM IS DEFAULTED AND THE "CONFLICT" ARGUMENT HE ADVANCES IS IRRELEVANT.

Strickler asserts that this Court should grant certiorari and stay his execution to review his claim under Brady v. Maryland, 373 U.S. 83 (1963). According to Strickler, this Court's decision in Kyles v. Whitley, 514 U.S. 419 (1995), abrogated the "due diligence" exception to the general rule that a prosecutor must disclose exculpatory evidence to the defense and that, after Kyles, it is immaterial to a Brady analysis whether the alleged exculpatory evidence could have been

discovered by a reasonably diligent trial attorney. Alternatively, Strickler argues that if the "due diligence" exception survived Kyles, the various courts of appeal are applying the exception inconsistently. Strickler's assertions do not warrant certiorari review for at least two reasons: his Brady claim is defaulted and the resolution of the supposed "conflict" on the "diligence exception" will not affect the validity of either Strickler's conviction or sentence.

A. Strickler's claim is defaulted.

Strickler concedes that he never raised his Brady claim in state court. (Petition at 12). The fact of the matter is that Strickler was appointed counsel nine months before he filed his state habeas corpus petition. During that nine months, state habeas counsel undertook to investigate possible claims and on September 1, 1992 filed a 51-page petition on Strickler's behalf. This petition did not include any allegation that the Commonwealth had withheld exculpatory evidence at the time of trial. As the Court of Appeals correctly ruled, Strickler, 1998 U.S. App. LEXIS 12805, *24-25, Strickler's failure to raise his Brady claim in state court is sufficient to foreclose federal review.[3] See Gray v. Netherland, 116 S.Ct. 2074, 2080 (1996) (Brady claim barred because claim never raised in Virginia courts and state relief no longer available). The decision of the lower court that Strickler's claim is defaulted for failure to present it in

[3] Contrary to Strickler's assertion in footnote 2 of his petition, his Brady claim is not defaulted because of "a change in state habeas law." The change in state law to which Strickler refers occurred in 1995, long after Strickler's state habeas petition had been dismissed. In addition, the Fourth Circuit held that Strickler's claim was defaulted, not because of this change in Virginia post-conviction law, but because Strickler did absolutely nothing to investigate and raise the Brady claim in state court.

accordance with established state procedure is a mere routine, fact-specific application of well-established principles of procedural default and does not warrant certiorari review.

The Fourth Circuit also correctly recognized that Strickler could not establish cause and prejudice to excuse his default. Strickler, 1998 U.S. App. LEXIS 12805, *25-31. The court ruled that Strickler's Brady claim could have been raised in state habeas through the exercise of reasonable diligence, id. at *27, and correctly held that Strickler did not exercise the required diligence during the state habeas proceeding. In fact, in the state habeas court Strickler did nothing to investigate this potential claim or any others, and he did not request discovery in the state habeas court.

In the court below, Strickler attempted to shift the blame for his lack of initiative to the Commonwealth by arguing that, under Virginia law, he was not entitled to discovery in state habeas corpus proceedings. The Court of Appeals, however, saw through Strickler's obvious ploy to blame the Commonwealth for his indisputable lack of diligence: "...in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files." Id. at *24. See Rule 4.1(b)(5), Rules of the Supreme Court of Virginia (authorizing discovery in state habeas corpus with prior leave of the Court). The lower court's conclusion in this regard was absolutely correct. After all, Strickler certainly was not entitled to discovery in federal habeas corpus. See Rule 6(a), Rules Governing § 2254 Cases in the United States District Court. That simple fact, however, did not prevent Strickler from pursuing a possible Brady violation or filing a discovery motion in the district court. Strickler obtained leave of the district court to conduct discovery, and pled an alleged Brady violation in his initial federal petition for writ of

habeas corpus. Strickler never has offered a persuasive reason why his state habeas counsel could not have done the exact same thing.[4]

B. The supposed "conflict" is irrelevant.

The Court of Appeals correctly ruled that, even assuming Strickler's Brady claim was not defaulted, the claim is without merit because the allegedly withheld statements were not "material." Strickler, 1998 U.S. App. LEXIS 12805 at *31 n.11. Thus, the primary argument upon which Strickler has based his certiorari petition – that there is a split among the federal courts of appeal regarding whether there is a "due diligence" exception to the Brady rule – is

[4] Strickler's assertion that he "has demonstrated cause based upon the state's uncontested, continuous suppression of the Stolzfus documents throughout state court proceedings" (Petition at 31) is categorically false. The State suppressed nothing: Strickler's defense team was aware of the information contained in the Stolzfus materials prior to trial. (RA 1). And, as Strickler himself established through discovery in the district court, at least three of the eight items allegedly suppressed (exhibits 2, 7 and 8) were in the Commonwealth's Attorney's file prior to trial and thus were available and known to Strickler pursuant to the Commonwealth's undisputed open file policy. A review of the three documents that Strickler was provided pursuant to the Commonwealth's open file policy establishes that the five documents Strickler allegedly was not provided contain no new information and no information materially different from what is contained in the three disclosed documents.

irrelevant.[5] In other words, Strickler's case clearly is not a proper case to for resolving an alleged "conflict" because no matter how such a "split" were resolved, it would not change the outcome of Strickler's case. Simply put, even if Strickler's claim were not defaulted, federal collateral relief for Strickler would be precluded by the Fourth Circuit's determination that the evidence in question is not material. Id. at *30 ("[t]he Stolzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial.").

To begin with, even a cursory examination of the allegedly suppressed documents establishes that each one of them, on its face, was wholly inculpatory. (RA 2-20). Indeed, Strickler has never claimed otherwise. Instead, his argument that the evidence was material has always been founded entirely upon his assertion that claimed inconsistencies between each of these statements and Stolzfus' testimony rendered them exculpatory. Whatever minor variations existed between Stolzfus' various accounts, however, hardly required their production. Any

[5] Of course, the alleged split between the circuits is irrelevant for an additional reason: there is no Brady violation in Strickler's case because ***Strickler's defense team had actual knowledge of the information contained in the allegedly suppressed documents***. In a sworn affidavit, Thomas Roberts, one of Strickler's two trial attorneys, stated:

> I have reviewed the [Stolzfus materials] and although I cannot recall if I have seen these specific documents, I do remember the information contained in them. I remember discussing with Mr. Bobbitt the possibility that Ms. Stolzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time. It seemed too good to be true.

(RA 1).

other conclusion would require a witness to give precisely the same account every time that he is questioned before or during trial, a requirement that is neither realistic nor reasonable.

The alleged "inconsistencies," furthermore, deal only with trivial matters which were not contested at trial. For example, Strickler never has contested that it was Leanne Whitlock who was abducted at the Valley Mall. Stolzfus' supposed inability to initially identify Whitlock is therefore immaterial for Brady purposes. Likewise, there was never any disagreement at trial about whether Whitlock was driving her boyfriend's dark blue car with West Virginia tags. Nor was there any serious disagreement about the facts surrounding Whitlock's abduction. Strickler, in fact, expressly admitted in closing argument to the jury that he had abducted and robbed Whitlock. (RA 26, 36-37). Impeachment of Stolzfus on these relatively unimportant matters under no circumstances would have created a reasonable likelihood that the result of Strickler's trial would have been different.

The Fourth Circuit also correctly concluded that the "Stolzfus materials" were not material under Brady because Strickler validly was convicted of capital murder in the commission of a robbery and Stoltfuz offered no testimony even marginally relevant to that conviction.[6] Strickler, 1998 U.S. App. LEXIS 12805, *30 ("Stolzfus' testimony was not critical

[6] Strickler's argument – that the Stolzfus documents were material because "Stolzfus portrayed Strickler as the only one who committed violent acts against Whitlock" (Petition at 33) and, without impeachment of Stolzfus, the jury was more likely to believe that Strickler was the person who pried the boulder out of the frozen ground and repeatedly struck Whitlock over the head with it while Henderson restrained her – must be rejected. Under Virginia's capital murder law, it was immaterial who dropped the boulder on Whitlock's head and who held her down. Both persons were equally culpable and both equally were subject to the death penalty. Strickler, 241 Va. at 495, 404 S.E.2d at 235; see also Coppola v. Commonwealth, 220 Va. 243, 256-257, 257 S.E.2d 797, 806 (1979), cert. denied, 444 U.S. 1103 (1980).

to the Commonwealth's case, especially in view of the overwhelming evidence in the record, independent of Stolzfus' testimony, demonstrating that Strickler abducted and robbed Whitlock"). In this regard, independent eyewitness testimony conclusively established that after Whitlock's murder, Strickler had driven Whitlock's car, that Strickler possessed and unsuccessfully attempted to use Whitlock's bank card, and that Strickler gave a companion a pair of earrings Whitlock was wearing on the night of her murder. And, the Virginia Supreme Court concluded that the 69-pound rock used to crush Whitlock's skull constituted a deadly weapon as a matter of Virginia law. Strickler v. Murray, 249 Va. at 129, 452 S.E.2d at 653. That being the case, there is simply no reasonable probability that the result of Strickler's trial would have been different had Stolzfus been "impeached" with the information Strickler belatedly developed and presented in his federal habeas action.

The Fourth Circuit's fact-specific application of the standard established by this Court in United States v. Bagley, 473 U.S. 667, 682 (1985) (allegedly withheld evidence is not "material" for purposes of the Brady rule unless there is a reasonable probability that disclosure would have changed the outcome of trial), and its determination that the evidence at issue in Strickler's case was not material clearly do not warrant a grant of certiorari. See U.S.S.Ct. Rule 10 (certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law."). See also Kyles, 514 U.S. at 460 (Scalia, J., dissenting) ("an intensively fact-specific case in which the Court below unquestionably applied the correct rule and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original); Texas v. Mead, 465 U.S. 1041 (1994) (Stevens, J.) (court does not review cases which primarily present questions of fact).

CONCLUSION

The petition for writ of certiorari and motion for stay of execution should be denied.

Respectfully submitted,

RONALD J. ANGELONE, DIRECTOR

By: Pamela Rumpz
Counsel

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CERTIFICATE OF SERVICE

On September 4, 1998, a copy of this Brief in Opposition was hand delivered to Barbara Hartung, Esquire, 1001 East Main Street, Suite 504, Richmond, Virginia 23219, counsel for the petitioner.

Pamela Rumpz
Pamela A. Rumpz
Assistant Attorney General

RESPONDENT'S APPENDIX

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SEP-25-1997 12:48 STAUNTON CIRCUIT COURT

AFFIDAVIT

Thomas E. Roberts, first being duly sworn, says:

In 1990, I assisted William E. Bobbitt, Jr., in the trial of Thomas David Strickler. I have reviewed the attached documents and although I cannot recall if I have seen these specific documents, I do remember the information contained in them. I remember discussing with Mr. Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time. It seemed too good to be true. The attached newspaper article is somewhat familiar. To the best of my recollection, we were concerned that Strickler had talked to a reporter without our knowledge or permission. It appears obvious that the witness quoted in the article is Ms. Stoltzfus.

I would be willing to testify to the above at the hearing scheduled for October 1 & 2, 1997 in the U.S. District Court at Richmond, Va. However, I am planning to be in Florida on a long-scheduled trip with my wife during that time.

Thomas E. Roberts
Thomas E. Roberts

City of Staunton
Commonwealth of Virginia

Subscribed and sworn to before me on September 25, 1997,

Brenda L. Morris
Notary Public. My commission expires:
May 31, 1999.

RA1

CASE # 90-01-06-0067
SUBMITTED BY DETECTIVE D.L. CLAYTOR

Summary of Interview: Anne E. Stoltzfus
565 Hartman Drive
Harrisonburg, Va. 22801
Phone # 434-2775
SSN/172-36-8187

On 1-19-90 and 1-22-90, Anne E. Stoltzfus was interviewed at the city police department after she advised that she recalled seeing some suspicious activity which might pertain to the LeAnn Whitlock case.

Ms. Stoltzfus advised that on Friday evening, 1-5-90, she was at the Valley Mall and observed a subject jump into a vehicle with a black girl, fight with the black girl, and then was joined by two other subjects. Ms. Stoltzfus stated that between 6:45 p.m. and 7:00 p.m. she and her daughter had completed their shopping and were leaving the mall, when she observed a black girl in a dark blue car coming into the mall parking area. Ms. Stoltzfus advised that she was sitting at the stop sign at the Penneys end of the mall (west end) when the black girl passed traveling east in front of the mall. Ms. Stoltzfus noted that she then turned right and fell in behind the black girl's vehicle and noticed that it had West Virginia tags. As they approached the front entrance of the mall, the vehicle stopped for what she thought was a bus or some type of vehicle. Ms. Stoltzfus advised that she observed a white male, long scraggly hair, run up to the passenger window of the black female's car and started pounding on the window and attempting

RA3

to open the door. The subject appeared aggitated and wild. He pulled open the door and jumped in next to the black female and got right up next to her. The black female started hitting the guy. The guy then turned and motioned and a white female and a second white male ran from the entrance area to the car. The female was described as 18-21 years of age, 5'5", 140 lbs., (A little over weight), blonde/brown shoulder length hair, pale plain face, wearing blue jeans and denim jacket. The second white male was described as tall, 6', dark hair, cream colored jacket.

Ms. Stoltzfus advised that as the white girl attempted to crawl into the back seat the car lurched forward and the horn started blowing continuously. The girl jumped back and the second white male ran back to the entrance of the mall. The black female and the first white male started fighting again, until the horn stopped blowing. The white female and the second white male then got into the back seat of the vehicle.

Ms. Stoltzfus stated she pulled up beside the vehicle to see if the black girl was ok but could not get her attention. The black girl just stared forward. At the same time she noticed that the white female in the back was staring back at her and the white male in the back seat was attempting to hide down in the seat. Ms. Stoltzfus advised that she moved forward a little and looked back at the black girl, still trying to get her attention.

She noted that the black girl was glancing her way but still did not turn her head, and was mouthing something which in thinking back could have been "help". Ms. Stoltzfus advised that she drove up to Medco and pulled over to see if the black girl was ok. The car drove past her and everything seemed ok. However, when the vehicle got up to Leggetts Store it drove up over the curb and the horn again started blowing. The vehicle continued on and was last seen heading toward Rt. 33.

Ms. Stoltzfus advised that she was not sure whether she could identify the white males but felt sure she could identify the white female. She further advised that prior to the incident in front of the mall, she recalled seeing who she thinks were the same blondish haired male and white female inside the mall. The white female bumped into her because the white male, who again appeared agitated or high, was yelling at her to get someone (she could not recall who) to meet him at the bus stop. Ms. Stoltzfus advised that the incident occured very quickly and that her daughter did not see anything.

-90 Anne E. Stoltzfus was shown the following picture show-ups after first reading the Photographic Show-Up Admonition: # 6266, 4663, 5992, 4199, 5976, R.C.S.D. # 12527. Ms. Stoltzfus pointed out R.C.S.D. # 12527, Ronald Henderson as resembling the subject described as white male # 2. Ms. Stoltzfus advised that it looked like the subject but the beard was not right. She noted that if she saw him in person she might be able to

identify him positively.

Photo Show-Up # 5031, 4787, 5900, 6186, 6337, 5906. Ms. Stoltzfus pointed out picture # 6337, Thomas David Strickler, as resembling the subject described as white male # 1. Ms. Stoltzfus advised that the hair color was not right in the photo. She advised further that she might be able to identify him positively if seen in person.

-90 Approximately 6:25 p.m. Anne Stoltzfus was shown a photographic show-up including photos # 5346, 5351, 9107, Connie Lamb photo, R.C.S.D. 9771, and 5676. Ms. Stoltzfus first read the photo show-up admonition and after viewing the photos advised that she could not identify any of the photos as the female who she observed enter Ms. Whitlock's car. She advised that if she saw the subject in person she would know for sure.

-90 Approximately 7:10 p.m. Ms. Stoltzfus was taken to the county impound lot where she viewed the Mercury Lynx, W. Va. license NKA-243. Ms. Stoltzfus advised that the vehicle looked like the one at the Valley Mall. She stated that it was the right color, size, and it had the same little blue stripe down the side, and had the same colored interior as the one she saw.

-90 Anne Stoltzfus advised that she had seen photographs of LeAnn Whitlock and, without a doubt, she was the black female that was operating the blue vehicle with West Virginia tags who she observed at the Valley Mall on 1-5-90. Ms. Stoltzfus further advised that the vehicle she viewed on 1-24-90 was the vehicle she saw at the mall. She had made up a quote to help remember the license number after the incident, "No Kids After 2-43".

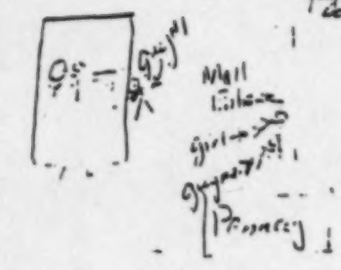
CASE # 90-01-06-0067
SUBMITTED BY DETECTIVE D.L. CLAYTOR

Approximately 9:30 a.m. Anne Stoltzfus, accompanied Detective Claytor to the Rockingham District Court to attempt to identify the female she saw on the evening of 1-5-90 with Tommy Strickler and Ronald Henderson. Ms. Stoltzfus observed a female known as Mary Jane Oplander and stated that Oplander looked like the girl she saw on 1-5-90.

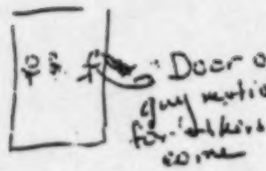
RAB
~~001268~~

1-A-90

Observations



1.) Black girl parked in front of Valley Mall Entrance in dark blue "nova" sports car West VA. tag
Scroungy "bum-type", "W. Va hick" with long scraggly blon hair(look) runs to passenger window pounds impatiently, then opens door & jumps. (A girl + gu leaning against outside wall; four people inside Mall Entr



2.) Black girl starts hitting the g in her car. He backs o and waves to the girl

3.) The girl + guy #2 run towards car. Girl hurts one leg i car, car lurches forward driver honks horn continu The girl (ave. ht., ~140lb, bl lt. brown hair, plain face, w jumps back + the guy #2 r back toward wall.

4.) Guy #1 + Black girl start fighting again. She stops blowing horn an girl + guy #2 (tall, dark hair, lt. cream get into back seats lean forward in a huddle with guy #1.

RAG

Action: 5.) I drive around car + parallel to car. I lo

over to see if black girl is O.K. She just stares straight ahead. Girl in back seat stares at me. I feel uncasy but uncertain of my uncasiness.

6.) I drive on to Medco Drug & park to see if the black girl is O.K.

7.) She drives the car past me, around corner, & at curb marked x above drives up over curb & honks horn. I follow them. They look normal. They turn left to go out to 33 & I turn right to go out other direction.

RA10
0C1E10

565 Hartman Drive

Harrisonburg, Virginia 22801

January 22, 1990

Dear Sargeant Claytor:

I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped jog my memory. I have an extraordinary visual memory but I hadn't placed all my mental pictures together with that same night.

Katie remembered my only purchase at the Mall of 4 name cards at $0.75 each at Centerpoint. We both remembered our trek after Centerpoint, but I thought it was a different night. So I knew that if I could confirm that one purchase, all the associated mental pictures following would have occurred January 5. I did this morning confirm by Centerpoint bookstores' cash register tape a purchase of that amount at 4:40p.m. (showed 4:30-10 minutes slow). This means that I can construct with good confidence our exact journey and get more accurate time estimates.

I picked up Katie shortly after 4:15 pm at the Medical Arts complex and headed to the Mall. We went first to Centerpoint bookstore to purchase a specific CD. They didn't have it and I purchased the name cards at 4:40pm and we left for K-Mart. I purchased a prescription and some other merchandise at 5:31pm (confirmed by cash register tape and also back of check #1190). We left K-Mart and drove back over to the Penney's catalogue sales/ Watson's lot. From there we went to:

Approx. Time	Place	Specific Memories
5:40pm	Centerpoint	Check to see whether we could order CD They didn't know how; suggested we try Record Corner or Musicland
5:45pm	Record Corner	No luck

RA11
0C1211

4

5:50pm	Musicland	Wasted 15-20 min. trying to get help to find the CD.
~6:05-6:10pm	"	Told to come back in about half an hour to find someone more knowledgable.
~6:10pm	Watson's	Looked around for half an hour.
~6:40-6:45pm	Musicland	Got there, still had to wait 5-10 min. Another guy finally came and helped but was no help.

** On the way back to Musicland the 2nd time I remember a girl who looked just like the girl who got into that car bumped smack into me. She was walking toward me facing the other (Leggetts) direction. A revved-up mountain man was yelling at her that he would meet her out at the bus stop. He went around the display and up the B. Dalton bookstore side and could have been the same guy who knocked on the car window because he had the same weird walk-like-an-animal gait. I remember looking at my watch and a gentleman who saw me asked me what time it was. I have a vague memory that my watch said 6:50 but is 5 min fast so I answered 6:45pm.

~6:50-7:00pm	Centerpoint	Asked briefly when someone would be in so that I could place the CD order and was told tomorrow (Saturday) manager Abe Clymer.

Approx. 6:55-7:05pm Returned to car. Had discussion about ear piercing and I decided to take Katie to Leggetts to show her earrings for unpierced ears. **We drove around the front of J.C. Penneys, stopped at the stop sign, and the black girl in dark blue car drove past.** (I saw a car that looked somewhat like hers parked next to the railroad tracks across from Valley Heritage (a company car?) only it was lighter blue.) Then I turned right and pulled up behind the black girl, noticed the West.VA tags, and observed the other things I told you.

Observations that corroborate the time that I saw those 3 characters get in the black girl's car to about 6:55 to 7:10pm are Katie's and my combined memories on when we got back home. Katie remembers being mad because everyone had already eaten supper and I heated up some spaghetti sauce for her but refused to cook some noodles because it was so late. I remember the argument. My memory is that I said it was only 20 after 7, which may have been 7:15 because our dining room clock is 5 min. fast. I also remember arguing that it would be close to 8:00 by the time I spent half an hour cooking noodles. She remembers being upset that she couldn't watch

TV because her dad was still watching his news program (McNeil/Lehrer Hour: 7-8pm). This means we got home after 7pm, because the children watching TV during the 6:30-7:00 national news is never allowed. It also means we got home before 8pm. I drove home the "back way", which may have taken 10 to 15 min.

I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window. ?Were those 2 memories the same person? The black girl couldn't drive when the bus pulled out because about 2-3 people coming from the parking lot walked in front of the car.

I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there. That was corroborated by Centerpoint this morning, so I feel very certain about the above approx. times.

Sincerely,

Anne Stoltzfus

Anne Stoltzfus
172-36-8187

P.S. - Katie doesn't remember seeing the 3 people get into the black girl's car, but she does distinctly remember my pulling over at Medco Drug and explaining that I wanted to make sure these people were out of sight. She remembers that as she was looking backward and asking "Who?" I said "There they go - up over the curb" (around the corner of Leggetts).

Also Katie had a specific memory of my buying the 4-pack of blank cards during the first visit to Centerpoint, which was corroborated by the Centerpoint register tape.

Notes for Detective Claytor:

My Impressions of "The Car"

(Anne Stoltzfus)

I remember the car as dark blue (navy) and shiny. The make was definitely not foreign but **American**. It was not a Subaru, Toyota, Mercedes, Renault, Peugeot, VW, or Honda. It was not a Buick or Cadillac. It was not a large, full-size car and not a mini car. I think it was smaller than a Buick Skylark and about the **size of a Buick Skyhawk.**

I can best describe the car **in comparison to** my VW **Rabbit**. The car was **wider** than my Rabbit, maybe two feet wider. It was **higher** than my Rabbit, maybe 3-6 inches higher. It was **longer** than my Rabbit, at least in front - by maybe a foot.

It was a standard **boxy** American style. [I remember looking for the make and not being able to see it in the dark. I have a vague impression of silver letters on the left rear that said *"Hollar"* beside or inside an oval emblem, but I'm not at all sure.] The **lines** of the car were **straight and parallel** to the road, i.e., the rear was not jacked up like many cars are. I think it was a **two-door**.

RA14
~~001214~~

1-25-90
1:45am.

Detective Claytor:
Tonight I identified beyond a shadow of a doubt that the black girl I saw 1/5/90 was LeAnn Whitlock. I spent several hours with John Dean looking at current photos from which I made the identification.
(Also his description of the girl in jail seems to pretty closely match mine.)
Thanks.
- Anne Stoltzfus

RA15
~~001215~~

January 26, 1990

Dear Detective Claytor:

As soon as I saw John Dean's pictures of LeAnn Whitlock, I knew beyond a shadow of a doubt that she was "the black girl" and then I remembered the license number. To realize that I actually witnessed LeAnn's abduction is terribly upsetting, because I came so close to notifying the police and to doing a couple other things that could have made this totally different. Even when I saw the car, I thought it could have an exact duplicate with a different owner. (As long as I could block out the license number, I could believe that.)

I should be able to identify all three of the persons I saw get into that car if I saw them in person, because I not only saw them get into the car but two other times inside the Mall. I am sure they are the same people. The first time I saw them was about 6:00pm inside Musicland. I had been waiting for a very tall, black guy ("Ron"?) to wait on me and as soon as he was free these three people came in. Mountain Man was impatient and I instinctively backed up and almost into the dark-haired quiet guy. My entire left arm brushed a long tan light-weight coat of a synthetic fabric that was draped over his right arm. I told "Ron" to wait on them first. When "Ron" was done with them he disappeared and a girl told me to come back in half an hour. The reason I had to wait when I came back to Musicland was because "Ron" never returned. A short, brown-haired guy ("Bruce") waited on me. They might remember and be able to identify these characters for you.

As I was returning to Musicland I had the hefty blonde girl crash into me and almost get her button snagged on my open-weave sweater, as I had told you. I'm sure this is the same girl who got into that car. Her face was round, her hair dark- blonde, scraggly, straight-cut almost shoulder length. I think she had a few freckles and I think grey-blue eyes. She had a certain "not-too-bright" look. She looked like an anemic, dopey version of woman #3 (upper-right-hand corner) in that group of pictures you showed me. As she bumped into me Mountain Man was yelling at her "I have to get out of here. Where's Ronnie?" She turned and I turned and saw the dark-haired guy standing near the end of the display toward J.C.Penneys in a long tan trench-type coat. Mountain Man said, "You and Ronnie meet me at the bus stop." She said, "Where's the bus stop?" I said, "Up at the Mall entrance." I remember Mountain Man was multi-layered. The bottom layer was a grey T-shirt that I think had blue writing "Harley Davidson" on it. My impressions flow together but I'll describe them anyway. The outer layer had a colorful bird decorated

RA16

on the back and I think red letters that said Fawley or Raleigh. In between layers were flowing, open in the front, and maybe longer than the outer layer. I think one layer was a faded denim-blue color shirt and another a greenish-greyish flannel shirt.

Another point of clarification. I think it was a white(?) pick-up truck that stopped ahead of us to turn left. I remember thinking, "They went in and parked and are now walking in front of the blue car while we're still sitting here waiting to go." Those people might remember the abduction. Also, when LeAnn laid on the horn there were 6 or 8 people inside the Mall entrance who looked out to see what was going on. There were a couple people in the parking lot who stopped and looked. They might be able to identify these characters.

Back to "the girl"... I told you she was the same height as me (5'6"). But I forgot that I am shorter because of a spinal injury and vertebral collapse (spondylolisthesis). I measured myself this morning as 5'4". She would wear about a size 14 or 16 blouse and about size 16 jeans. [I have a crazy association of another girl who reminds me of this girl and probably is not. But I'll tell you anyway. December 1987 I was working at Leggetts at Valley Mall as a sales clerk. A girl who looked similar to this girl came in and tried to get a cash refund from me for merchandise she had just gotten in exchange for a $90 dress that had been stolen. I alerted security and detained her long enough for a hot-headed hick waiting for her in the car to come in and raise a ruckus.]

Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw LeAnn's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make. Now that I know what it was that I saw, I have been very upset and I really don't want to look at any pictures or people for a while. I need to be trying to study. I am really glad you left me in the dark all this past week, because otherwise I think I would have been too upset to remember anything. I want to cooperate in your investigation and would be willing to help later on. It's just that right now I need a break. Thanks.

Sincerely,

Anne Stoltzfus

Anne Stoltzfus

RA17

Details of Encounter Mountain Man, Shy Guy, Ionde Girl

My first encounter with Mountain Man was about 6:00 p.m. January 5, 1990. I was in Musicland at Valley Mall waiting to be waited on when he stormed in with Blonde Girl. I instinctively backed up and into Shy Guy. I remember touching the long tan coat he had draped over his arm and thinking that I felt something hard. I apologized and Shy Guy smiled slightly. As he quickly put on his coat and put his hands into his pockets, his soft brown eyes dispelled my fears. The tall black Musicland clerk (Ron or Rob) came over to wait on me and I told Mountain Man to go ahead, since he was so impatient.

About 45 minutes later I saw Mountain Man again when he was coming toward me as I approached Musicland coming from the Centerpoint Bookstore direction at Valley Mall. Shy Guy had just walked past me and Blonde Girl was walking toward me several yards ahead of Mountain Man. Mountain Man was yelling, "Donna, Donna" very loudly. I asked Blonde Girl if she was Donna and she said, "Donna or Sharon". I said, "He wants you." (I stopped in my tracks and watched Mountain Man because he was so revved up that I thought he was either manic or on drugs.) She turned around and Mountain Man said, "Where's Ronnie?" She said, "Up there", pointing toward Penneys. As Blonde Girl started walking, Mountain Man yelled, "I gotta get outa here. You and Ronnie meet me at the bus stop." She looked back and said, "Where's the bus stop?" and crashed into me. We both apologized and I then gave her directions to the bus stop. Then I promply tried to follow Mountain Man up the other side of the display because I was concerned about his behavior, but I lost him and proceeded back to Musicland.

I spent about 5 minutes in Musicland, 10 minutes in Centerpoint Bookstore, and then went to my car in the Watson's/Penneys' lot. This was approximately 7:00 p.m. I was with my 14 year old daughter.

I drove in front of the west end of Penneys and stopped at the stop sign. A black girl in a nice shiny dark blue car drove in. She was singing. (I remember thinking, "Rich black college kid.") I turned the corner and stopped behind her at the Mall entrance. I noticed her West Va. tags and thought, "Rich black college kid from West Va." She had stopped because there were vehicles ahead of us. My memory is some sort of mini-bus was parked and waiting to leave. Mountain Man had come tearing out of the Mall, ran up to the bus and yelled at the driver, and then hit the back of the mini-van/bus as it drove off. I remember telling my daughter to look at "that madman". Ahead of the black girl was a pick-up truck, which was waiting to turn left. About this time Mountain Man ran up to her car (passenger side) and started yanking on the door handle and yelling. He couldn't get the door open and started pounding on the window. She reached over to the door I believe to make sure it was locked, because Mountain Man tried again and

was furious and didn't get it open until he shook and shook the door with both hands. He jumped into the car, smack up against her, and she crouched toward her door and started hitting him with her right arm. (I thought it was a domestic squabble. Mountain Man didn't look like he fit with her, but he did look like he came from West Va.) The Mountain Man leaned back over, opened the passenger door, and motioned to Blonde Girl and Shy Guy to come. They had been leaning up against the outside wall. Blonde Girl put one foot into the car and the car lurched forward and nearly hit the family from the pickup truck that had parked. The black girl laid on the horn for quite a while and Mountain Man kept hitting and hitting her until she stopped. (This caught the attention of 8-12 people inside and outside the Mall, but they all seemed curious at first and then unconcerned.) Then Blonde Girl got into the back seat and Shy Guy followed. He handed his tan coat to Mountain Man, who laid it down on the floor and fooled with it for a while. Blonde Girl and Shy Guy sat front on their seats touching the black girl while Mountain Man was bent over (all buddies, I thought). As soon as Mountain Man sat up and came over against the black girl, the other two sat back and relaxed.

But the black girl wouldn't go. I tapped the horn and there was no response. (Now I was starting to get worried.) I pulled up beside them, exactly parallel, honked the horn to get her attention, but she sat there expressionless, like a mannequin. I jumped out of the car and started to walk between the two cars to talk to her, but there wasn't enough room. Shy Guy looked scared and laid down on the back seat as if to hide. Blonde Girl kept staring at me. I got back into my car and pulled front so that the black girl had a complete view of me. I asked her three times, "Are you O.K.?" Each time she would meet my eyes and then purposefully look down to her right side. I was frustrated because she was expressionless and said nothing and seemed to intentionally look away. (I wonder now if there was a knife or gun at her side.) Finally, I pulled forward a bit more, honked the horn, and said again, "Are you O.K.?" This time she mouthed, "Help". I started to drive away and only when I reached Medco Drug did I realize that she was saying,"Help". I pulled over and told my daughter to run in to get security but about that time the black girl started driving past us. I had my daughter write down the license number on a 3x4 card - West Va./ NKA-243.

As the car went around the corner at Leggetts it went up over the curb. The car really tilted, the horn honked, people were hitting each other, and I thought the whole bunch of them must be drunk. My daughter and I followed them out to the stop sign. They sat for a while at the stop sign and they all seemed calm again. I told my daughter to help me remember, "No Kids Alone to (2) 43. 2+43 makes 45, my age." Then they turned left and got into the lane to head back into town. I was going to follow them, but they switched lanes to head out 33 East. I noticed I was almost out of gas and I am not familiar with that part of Rockingham County, so I drove back toward

the telephones at the the[illegible] entrance to call the police. (W[illegible] I got there I realized all I could say was some kids that looked like they were drinking and fighting and carrying on were driving out Rt. 33.) I rationalized away my bad vibes and decided to drive on home and get my family their supper.

So where is the 3x4 card?.....It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU. I was too busy to read the paper or listen to the TV news. I did learn at JMU that LeAnn Whitlock had disappeared from Valley Mall January 5, but I hadn't seen a black girl inside the Mall that night and didn't make the association. The following week it was a frequent topic of conversation in my classes. Monday, January 15th, I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag. I remember the thought running through my mind, "The police won't find it there." My heart started racing and I said outloud, "What?! Am I paranoid?" But I still made no association.

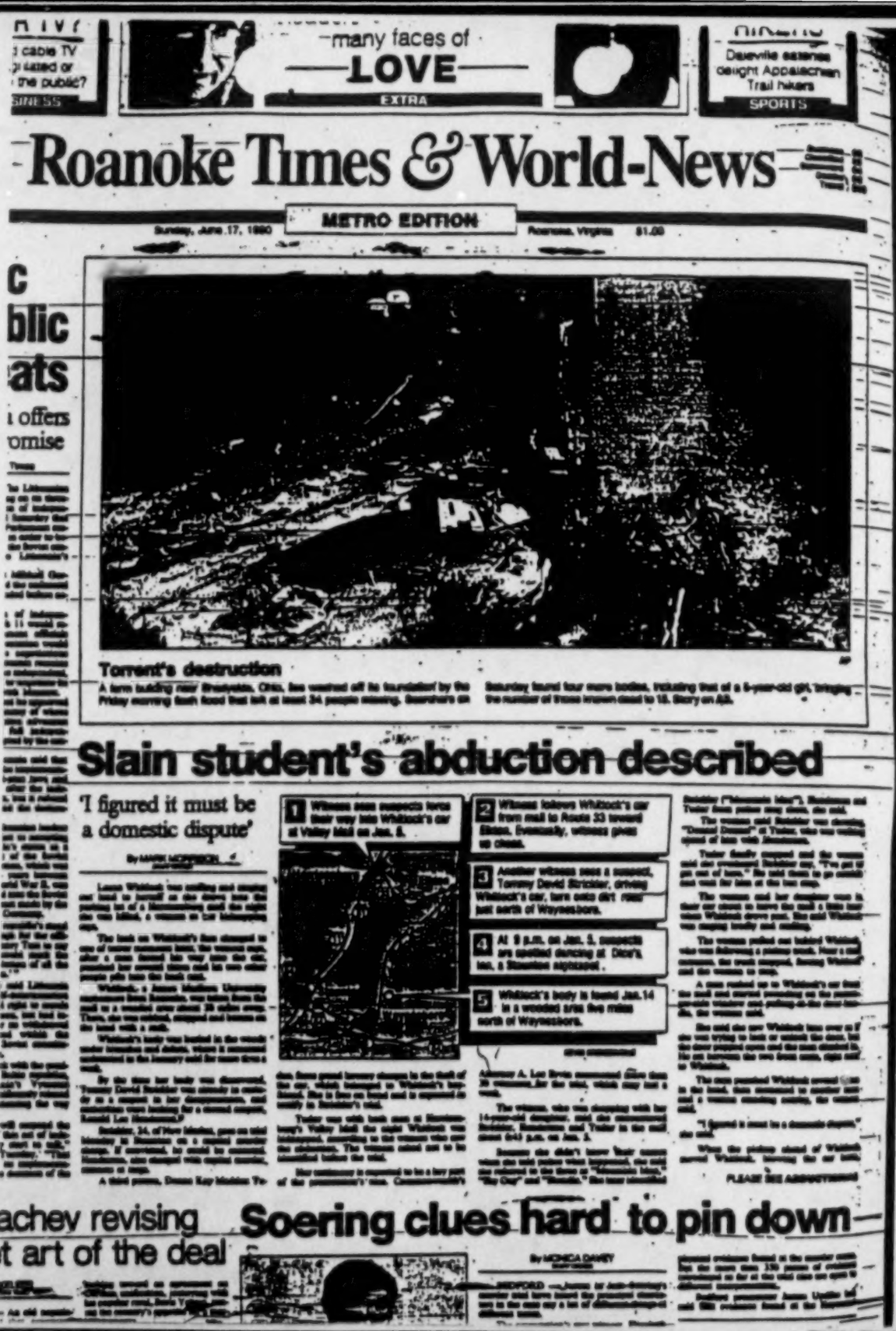
Wednesday I saw a newspaper picture of John Dean's car, but I didn't consciously recognize it. The newspaper bothered me, so I put it on a pile of papers by the woodstove. The picture still haunted me and distracted me from studying. I finally tore it up and burned it in the woodstove.

Later Wednesday in one of my classes I was talking with Kim Davis and some other black students about LeAnn. I told her that I was at the Mall that night, but that I didn't see any black girl inside the Mall. Then I told her about the crazy car in front of me. She reported that to the police. Thursday afternoon a detective came to my class and Friday I had to go to the police station to talk to Detective Claytor.

All weekend whenever I tried to get to sleep I was haunted by this nonsense chant, "No Kids Alone to 43." I still made no conscious association. I did know that it was unusual for me not to remember license numbers. Even later when I saw John Dean's car and recognized many of the details, the interior grey, etc., I could not recognize the license number. I did know that every time Detective Claytor asked me about the number I felt like I was going to cry. Later that night when I saw pictures of LeAnn and knew she was the black girl in that car, I immediately knew the license number.

– Anne Stoltzfus

RA 20
~~961230~~



many faces of LOVE
EXTRA

Daleville extends delight Appalachian Trail hikers
SPORTS

Roanoke Times & World-News

METRO EDITION

Torrent's destruction

Slain student's abduction described

'I figured it must be a domestic dispute'

1 Witness sees suspects force their way into Whitlock's car at Valley Mall on Jan. 5.

2 Witness follows Whitlock's car from mall to Route 33 toward Salem. Eventually, witness gives up chase.

3 Another witness sees a suspect, Tommy David Strickler, driving Whitlock's car, turn onto dirt road just north of Waynesboro.

4 At 9 p.m. on Jan. 5, suspects are spotted dancing at Dice's bar, a Staunton nightspot.

5 Whitlock's body is found Jan. 14 in a wooded area five miles north of Waynesboro.

achev revising
t art of the deal

Soering clues hard to pin down

RA 21



Abduction

FROM PAGE A1

3 DAY SALE

NATIONAL TV APPLIANCE

MONDAY-TUESDAY-WEDNESDAY ON

13" COLOR TV

$149

VHS VCR

$188

Quasar

$269

$14

21.0 Cu. Ft.

$579

White-Westinghouse Heavy-Duty Laundry Pair

$329.95 $249.95

$17

$269

$399

$249

INSTAN SAVING

Chest Freezer

Compact Design

GENERAL ELECTRIC

ROOM AIR CONDITIONER HEADQUARTERS

FROM

LAST WEEK TO REGISTER

HURRY!

B.B.A. for you!

RA 22

Thank you.

JUDGE: Thank you Mr. Ervin. Mr. Bobbitt. Where are the instructions?

MR. ERVIN: Right here Judge.

MR. BOBBITT: Your Honor if it would please the Court. Ladies and gentlemen of the jury, we began the other day in the trial by asking all of you the questions that have to be asked in this type of a case, in the whole series of it and each one of you was asked if you would decide the case solely on the evidence that was heard, presented from the witness stand and each of you agreed that you would do that. In a few minutes it is going to be your function to decide the case based on the evidence you heard and the key question in this case as Mr. Ervin has indicated, is that you will have to decide what the evidence proves about Mr. Strickler's participation in the murder that took place in this case. Now you have received the instruction on capital murder and I want to go over that. I know Mr. Ervin read part of it. The capital murder instruction lists the elements that are part of that offense, that have to be proved to establish that offense. And the first element, the first thing that is listed is that the

defendant killed Leanne Whitlock. That's the first and primary element of the capital murder charge, the instruction. There is another instruction which defines that element a little bit. It says that the Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock, before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. And Mr. Ervin has also gone over that entire instruction with you and you will have these back with you so that you can go over them yourself. I want to review with you now, some of the evidence, particularly in regard as how it, what it shows about Mr. Strickler's participation in the murder. The evidence shows that two men and a girl were at the mall. Ms. Stolzfus said she saw these people there and she met him and that she saw them abduct Leanne Whitlock. They come and beat on the car, got in the car and drove off in it. A little bit later there was a man that said that he saw the car coming down 340 and there appeared to be four

RA 24

people in the car as it turned in this lane that he was familiar with. He saw just three people at that time and it is not explained as to why there were four people and then three people but perhaps the person in the back had pulled down somebody. He said the person in the back had their arms sort of up in a funny manner. But he says that he identifies Mr. Strickler as being the driver of the car and that there was a girl, a white girl, who was in the passenger seat next to him. The evidence clearly establishes that the murder took place in that field where the car turned down. That that is where Leanne Whitlock was killed. There are holes in the ground there. There is blood in the holes in the ground, there was hair and there is a rock and there is blood on the rock and the body was found there and there is the medical testimony, the evidence that the blows, that type of wound, the fractured skull. That there was instantaneous death and that, it's clear that that is where Leanne Whitlock was killed. The next real direct evidence we have is Henderson and Strickler were seen about nine that night at Dice's Inn. Several of the girls testified, said that they saw them there that night. They saw them leave with Donna Tudor that night. Donna

RA 25

Tudor went with them. The next witness in the sequence of events for that night is that the witness, Mr. Workman, said that Henderson came to his house about four or five o'clock that night. Came in, appeared agitated, was rubbing the blood on his blue jeans and he said I've killed somebody. I didn't want to do it but I had to kill someone. The evidence is that shortly after that Mr. Strickler and Donna Tudor leave, leave Henderson there, go, they end up going to Virginia Beach. They are at Virginia Beach for about a week and they get back, shortly after they get back here, the car breaks down and the car is left at the church and Mr. Strickler and Donna Tudor are arrested. When they are arrested there are items in their possession, of course they are connected to the automobile, the automobile that Leanne, Strickler had. There are credit cards, earrings, Donna Tudor had the earrings. There are personal belongings that were in Leanne Whitlock's possession, that are in their possession after they are arrested here in Augusta County. Now all of that shows pretty clearly and without much dispute as Mr. Ervin indicated, that there was a robbery and that there was an abduction and that a murder took place. But it doesn't prove who

killed Leanne Whitlock. And there is additional evidence that I want to get in to now that tends to go to that point. A part of that is that later on things were found at this sight where the body was ultimately discovered. The first thing that was found was Henderson's wallet with his identification in it. The next thing that was found was a shirt and bra that was sent to the lab. There was, there was the lab analysis and the experts who testified said that they were hairs that came off of the shirt and bra. They never testified as to whether the hair came from the shirt or the bra. It was all submitted as one package and there is no evidence as to what, where the hairs came from. Just that hairs were removed from the shirt and bra that were sent were identified, were consistent or similar to the hairs, to Mr. Strickler's hair. The man said that that is not a positive personal identification but they are consistent with Mr. Strickler's hair. There is also no evidence as to whose shirt and bra that was. There was never any evidence that was Leanne Whitlock's shirt or her bra. The only evidence is that this piece, items were found there at the scene just like Henderson's wallet was found there at the scene. And that these

hairs came from somewhere on them. We don't know whether it is the shirt or the bra but they came from somewhere on them. And I would submit to you that the evidence as I said clearly shows that an abduction took place and that there was a struggle during the course of the abduction and it's, if this was Leanne Whitlock's shirt, it's conceivable that the hairs that were on there got there during the course of the abduction. We just don't know that, we don't. And that point we have to speculate about as to when they got there and what the significance of it is. We can speculate about all of the evidence that comes from the scene itself. Were there two people there, were there three people there? The security guard at, that testified first from Valley Mall said that she saw Henderson and Strickler walking around and that there was, she never saw any woman, never saw a female with them. But Ms. Stolzfus was definite, was positive that there was a woman and she described her. Said she was referred to as Donna. Said that they said this is Donna or Sharon. We can speculate about what the people that were there were doing. If there were three, what were two doing and what, who was doing what? Was one person turning the car around while the others

RA 28

were doing something with Ms. Whitlock or, but we just don't know from the physical evidence and from the, from what was submitted, we don't know what was taking place. We have to guess and we have to speculate about what happened. You've been given the instructions and it says suspicion or probability is given, probability of guilt is not enough for a conviction. In other words, it is not enough to say that Mr., Mr. Strickler was probably doing this or he probably had a part in it or it was very suspicious. It has to be proved beyond a reasonable doubt that he actually was the person who killed Leanne Whitlock before you can find him guilty of capital murder. And there is evidence that points to, to Henderson. He was identified at the mall, he jumped in the car, he apparently was in the back seat. The man that was there was in the back seat. The woman was in the front seat. There is a white woman. So there is evidence that, that Henderson was sitting in the back seat and there is an inference that that's where Leanne Whitlock was at that time when they turned in the lane. Henderson's billfold was found in the field so he was definitely there. Henderson had blood on his pants. Now there are several people that have testified that there has

RA 29

been blood on his pants. Workman said that he was rubbing the blood spot on his pants when he was there in his apartment. The lab report says that the pants that Henderson took off at, at Ms. Silvious's house had blood on them. That's an indication that he was there. And on top of all of that he made the statement, that I have already referred to, that he had, that very night that he had killed someone. So there is evidence that certainly points to him. There is also evidence that points to, to Mr. Strickler. There is the testimony of Donna Tudor but I would submit to you that her testimony is just not credible. First of all, she has made a deal with the police. She has been charged in this. She came back, she was arrested, she was in the car, she had, she had the earrings on and so she says I will make the deal, I will tell you what you want to know if you will just let me off, get me out of this charge and she said that was what the agreement was. In fact, even so, the Commonwealth wasn't, didn't trust her enough to, to believe that she would be in Court so they had her put in jail a couple days before the trial so that she would be here for her to testify. That's how reliable she is. On top of that was the testimony of her estranged husband,

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Jay Tudor, and I really, I don't know what you need to make of that or not make of it but anyway he says that she, she made the statement to him that she actually was there at the place. Maybe she made a statement or maybe she didn't make a statement to him. She said that she was there at the house but she denied making the statement. But there is some evidence indicating that she could have been there. There was several witnesses that say there, there was this woman, this woman seems to fit Donna Tudor's description. The name of Donna was used. It's certainly possible that she was there and if that is the case, she at this point isn't going to acknowledge it. And if she is there, she is certainly able to tell the police what they want to know. She also, what she says isn't clear. She is very vague about what she says. She says, she said they said something about "it". She wasn't really, we don't know whether that refers to the incident with Leanne Whitlock or does that refer to something else because it is ambiguous. What does "it" mean when she is referring to it. She keeps using the word in her testimony. She always says they said this. She never says who did what, she just says they were whispering and I couldn't really hear

RA 31

them and they said something but I really couldn't hear it. So her testimony is very vague. Mr. Ervin tried to get her to say certain things that indicated that, that she had heard Strickler say something but she really never said. She said all I heard was this whispering that they were saying that something had happened and I overheard something about a rock crusher and they said these things and she never really explained what that meant. Now she did, she said, she also said that there was blood on Mr. Strickler's pants. But she is the only witness who said anything about that. There was, the witnesses that the Commonwealth called from Dice's Inn. They were all asked how Strickler was dressed that night. And one of them said he was dressed very nice. His pants were a little dirty but nothing out of the ordinary. She didn't say anything about any blood on the pants and she had indicated she observed them. The, Mr. Strickler's mother who of course is a biased witness, she is his mother, testified that she washed the laundry and that there wasn't any blood on the pants, on Mr. Strickler's pants when she washed them. But in addition to that, the lab technician said that there is a test that can be done to determine if blood is present even after

RA 32

the clothes have been washed and we ran that test and that didn't show that there was any blood present. So there, so there's no evidence except for Donna Tudor's statement that she, and she is saying that this was a week afterwards when the clothes were washed. There was blood on there. But nobody who saw Mr. Strickler that night or the next morning said anything about that. In fact the ones that were asked directly said they didn't see any blood. There is, there is the black shirt that has been put into evidence and that was shown to all the witnesses. Some of them said they identified it, some of them said they didn't. One of the girls at Dice's, well she, Mr. Ervin said is this the shirt that Strickler had on and she said no that's not the shirt. Ms. Stolzfus said I can't say that's the shirt he had on. So there is some connection, I mean there is some confusion as to whether that is the shirt Mr. Strickler actually had on that night. The only thing that we know about it is that that is the shirt that came back from Virginia Beach because that is the shirt that was there in the car. Donna Tudor said it came back from Virginia Beach because she said she put it there in the car. There were stains on that, some body fluids, semen and blood. If

RA 33

Strickler and Donna Tudor had been together for the whole week and the shirt gets back there, we don't know where those stains came from or how they got there and there is no, there is no evidence to say that those things are identifiable with, with Leanne Whitlock or that they in anyway originated from the night that the murder took place. So there is really no connection between that black shirt and the murder itself. It is just a piece of evidence that came in a week or so later. I've already referred to the, to the hairs on the shirt and bra and that's a piece of evidence that connects Mr. Strickler to the scene. It was found there at the scene, it had his hair on it. But what does it mean? The meaning of it is not clear because there was this abduction. There is no evidence as to where the shirt and bra came from or where the hairs came from off of there. Conceivably it could be the (inaudible) of the other woman that was, that was present. We just don't know that. So the significance of that is not clear. And it certainly doesn't prove that Tommy Strickler was involved in the murder other than he was there. And I'm saying involved, I mean he was the actual, the perpetrator of the murder. What there isn't is, there isn't evidence

to show that he, that Tommy Strickler was right there around the murder scene. There were fingerprint and footprints introduced in the evidence to show that Tommy Strickler was in the car but there wasn't any evidence of that sort, no footprints, no fingerprints to show that he was right around where the rock was and that he was right around where these holes in the ground were or that he was around where the body was. There is nothing of that sort to show that he was right there where the murder took place. There is, there are no, there is nothing, no hair or anything of Leanne Whitlock that was on his clothes that would show that, that he was in close contact with her. There are no eyewitnesses. And of course, there wouldn't be. But in sometimes they are. I mean in some cases of a murder there are witnesses and certainly that, that helps prove things. For instance, in this case, in the abduction, there is an eyewitness, there are eyewitnesses, so compare the way you feel about the certainty you feel that Tommy Strickler got in the car and took the car, to the uncertainty you feel about what happened at the sight of the murder and that is the sort of judgment you need to make. You need to be certain. You need to

believe beyond a reasonable doubt that he was the actual perpetrator. The person who committed the actual murder, before you can find him guilty of capital murder. Now I want to go over with you briefly the first degree murder instruction. That instruction lists the elements also and the elements of that offense are that Leanne Whitlock was killed. That the killing was malicious. That the killing occurred in the commission of a robbery, rape or abduction. That the defendant was a participate in the commission of this robbery, rape or abduction. That the defendant or another participate in the commission of this robbery, rape or abduction killed Leanne Whitlock. So that certainly seems to fit the situation in every one of those elements. Whereas on the other hand, the capital murder instruction, you have to speculate. You have to guess as to, to reach the elements of that offense. And there is also the instruction that if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of a lesser offense. If you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. So that,

that tells you that you, if you have a doubt, if you have a question, you have to resolve that doubt with the lesser offense. In this case, the Commonwealth has not established who did the actual killing. They have got theories about somebody had to be doing this or maybe two people would have had to pick up the rock or maybe somebody would have had to hold the person down. But those are just theories, there is nothing in the evidence to support that. They haven't established who delivered the blows to the head of Leanne Whitlock that actually killed her. You would have to go outside the evidence to say that Tommy Strickler did it. You would have to speculate that he was there doing something that there is no evidence that he was doing. And you are not suppose to go outside of the evidence. I would ask you in this case to return a verdict of guilty of first degree murder and not guilty of capital murder. Thank you.

JUDGE: Thank you Mr. Bobbitt. Mr. Ervin.

MR. ERVIN: May it please the Court. Ladies and gentlemen Mr. Bobbitt is an excellent defense lawyer. He has been in the business a long time and he does like many defense lawyers

(5)

No. 98-5864
A-186

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TOMMY DAVID STRICKLER,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,

Virginia Department Of Corrections,

Respondent.

Supreme Court, U.S.
FILED
SEP 9 1998
OFFICE OF THE CLERK

On Petition For A Writ Of Certiorari To The
Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND STAY OF EXECUTION

Imminent Execution Scheduled
September 16, 1998

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A-186

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TOMMY DAVID STRICKLER,
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v.

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Virginia Department Of Corrections,
Respondent.

On Petition For A Writ Of Certiorari To The
Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND STAY OF EXECUTION

The petition for certiorari argued that the Fourth Circuit in this case had extended the putative "due diligence" exception to the prosecution's duty under Brady v. Maryland, 373 U.S. 83 (1963), in a manner inconsistent with the longstanding precedents of this Court, with the rulings of those Circuits that have recognized such an exception, with the established doctrine of this Court on procedural default, and with simple fairness. As a result of this extension, the Court below reached a result that left Petitioner to bear the fatal consequences of wrongdoing by the prosecutor. Unless this Court intervenes, the Fourth Circuit will continue to eviscerate two fundamental principles essential to the fair administration and review of criminal trials: (i) the prosecutor must voluntarily disclose impeachment and exculpatory material to the defense, and (ii) the state's suppression of such material constitutes cause excusing procedural default. In light of the basic issues of law and policy raised by these proceedings, Petitioner urges this Court to intervene.

Respondent has ignored the most basic obligation imposed on the prosecutor--to seek justice and not simply a conviction by any means. Berger v. United States, 295 U.S. 78, 88 (1935). Respondent never addresses the prosecutor's erroneous and misleading pretrial representation that all Brady material was contained in the prosecutor's "open file" and the state's erroneous and misleading representation in state habeas that all Brady material had been disclosed.[1] Instead Respondent has chosen to reargue factual issues that were decided against him in the district court, which factual findings were adopted by the Court of Appeals. Moreover, Respondent blatantly misstates the facts, as he has in the courts below. For example, he asserts in the opening sentence of the Opposition Brief that Strickler is guilty of rape. Not only was Strickler never charged with rape, but the prosecutor admitted at trial that there was no evidence to support the charge. The allegation is repeated solely to further prejudice this Court. This tactic is characteristic of the state's handling of this case

[1] "Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal [Brady] motion. . . Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can [Strickler] show prejudice." Commonwealth's Motion To Dismiss in State Habeas (11/12/92), JA 542-543; Pet. App. F (attached).

"JA" refers to pages of the Joint Appendix filed on appeal in the Fourth Circuit.

throughout.

Respondent engaged in repeated violations of this Court's Brady doctrine during state court proceedings. In this case, as in others, the Fourth Circuit has repeatedly excused and implicitly condoned Respondent's failure to disclose Brady materials. See Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996); Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995); Stockton v. Murray, 41 F.3d 920 (1994); Epperly v. Booker, 997 F.2d 1 (4th Cir. 1993); see also, United States v. Wilson, 901 F.2d 378 (1990).

To deny review of this case -- which presents issues well worthy of this Court's consideration -- on the basis of Petitioner's alleged "defaults" would be to reward and encourage the very misconduct that Petitioner seeks to challenge.

I. The Fourth Circuit's "Due Diligence" Exception To The State's Disclosure Obligation Conflicts With The Decisions Of This Court And Every Other Circuit, And Petitioner Is Entitled To Relief.

Respondent has not addressed the substantive arguments presented by Petitioner concerning a due diligence exception to the State's obligation to disclose impeachment and exculpatory material. Thus, Petitioner will not repeat here his previous arguments in the Petition for Certiorari.

Respondent argues that the Brady claim is defaulted and, therefore, the conflict presented by Petitioner is irrelevant. Respondent is simply wrong. The Fourth Circuit applied a "due diligence" requirement under Brady as the legal standard used to assess both procedural default and cause to excuse default. The

Court reasoned as follows:

> [R]esolution of the question of whether Strickler's Brady claim is procedurally defaulted turns on whether the factual basis of Strickler's Brady claim was available to him at the time he filed his state habeas petition.

Strickler v. Pruett, Pet. App. A at 10. The availability of the Brady materials to defense counsel becomes the standard for determining default.

The Court continued in this vein:

> On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a Brady motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all Brady material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stoltzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

Id. at 12. The Fourth Circuit accepted the district court's uncontested factual findings that the state represented in state habeas that all Brady material had been disclosed in the open file of the trial prosecutor and that the prosecutor had an open file policy. As set forth in the Petition before this Court, the police files at issue are privileged documents. Pet. at 29-20; App. E.

Nevertheless, the Fourth Circuit held that "the factual basis of Strickler's Brady claim was available to him at the time he filed his state habeas petition and, therefore, the Brady claim is procedurally default[.]" Id. at 14-15. The Court reasoned that Strickler should have made a discovery motion for which he had no

factual or legal basis and then further speculated that the evidence would have been produced. Ibid. Thus, the Court of Appeals imposed a due diligence requirement on defense counsel when determining the availability of Brady materials--whose very existence the state consistently denied--and concluded that defense counsel had procedurally defaulted the claim[2].

Having reasoned that defense counsel defaulted the claim based on a due diligence exception to Brady, the Court held that Strickler could not establish cause to excuse the default and used the same due diligence standard:

> Strickler asserts that the factual basis for his Brady claim was unavailable to him at the time he filed his state habeas petition and, therefore he has established cause for the procedural default. But, as noted above, Strickler's Brady claim was available to him in state court through the exercise of reasonable diligence. As such, he cannot establish cause based upon the unavailability of the Brady claim. See Stockton v. Murray, 41 F.3d 920, 925 (4th Cir. 1994)("Even if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.")

Id. at 16 (emphasis added). The Fourth Circuit rejected Strickler's argument that he had demonstrated interference by the state that made compliance with the state procedural rule impracticable and that he had shown that the factual or legal basis of the claim was not reasonably available to counsel, citing McClesky v. Zant, 499 U.S. 467, 493-94 (1991). Id. at 15. Thus,

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[2] In state habeas, Strickler had moved for expert and investigative assistance to help develop his claims. He also requested an evidentiary hearing. The state successfully opposed these motions. JA 638-41. The Fourth Circuit does not address these facts when finding default.

the Fourth Circuit's decision in Strickler was based on its sweeping due diligence exception to Brady and its progeny.

Petitioner seeks review in this Court on a fundamental issue. First, whether the adoption of a "due diligence" exception is fundamentally inconsistent with this Court's Brady jurisprudence. If so, Petitioner is entitled to relief. Second, whether the exceedingly high standard imposed on defense counsel by the Fourth Circuit when assessing diligence swallows the constitutional rule requiring the prosecutor to disclose under Brady. If so, Petitioner is entitled to relief. Thus, resolution of the question is not irrelevant to Petitioner's conviction and sentence, as Respondent maintains.

II. The Courts Below Found That Petitioner Had No Knowledge Of Five Critical Brady Documents.

Respondent argues that Petitioner knew about the Stoltzfus documents in state court and, thus, has defaulted the Brady claim. However, these factual issues were resolved in Petitioner's favor below. The district court found that Ervin, who was the trial prosecutor, had no knowledge of five of the eight Stoltzfus documents contained in the Harrisonburg police file. The district court found that these five documents were never disclosed through the prosecutor's "open file" to Petitioner's defense counsel or to defense counsel for the co-defendant, Henderson. Pet. App. D at 18-19.

Strickler's counsel, Bobbitt, and Henderson's counsel, Franklin, submitted affidavits stating that none of the Stoltzfus

materials were in the prosecutor's open files that both defense attorneys reviewed in preparing their respective cases. App. D. at 17. Both Bobbitt and Franklin reviewed their cross examination of Stoltzfus, and neither used any of the Stoltzfus materials to impeach her trial testimony, further evidence of the prosecutor's failure to disclose the documents. Bobbitt Affidavit (8/19/97); Franklin Affidavit (9/5/97); Pet. App. G (attached).

The district court did not resolve the conflict concerning the remaining three documents that Ervin claimed he had at the time of trial given the clear Brady violation involving the remaining five documents, all unknown to Ervin, Bobbitt, and Franklin. These factual findings were not clearly erroneous and were accepted by the Fourth Circuit. Nevertheless, Respondent reargues this settled factual issue before this Court. Resp. Opp. at 11 n. 4. The argument must be rejected.

In addition, Respondent takes the contradictory position that although the prosecutor, Ervin, had only three Stoltzfus documents, somehow Strickler's defense counsel knew the contents of all eight documents. However, Det. Claytor had distributed his typed report on the interviews with Stoltzfus (exhibit 2) to the Rockingham prosecutor, not to Ervin, and did not recall distributing any other materials to any other party. App. D. at 18. Respondent never explains how the defense purportedly obtained police reports never disclosed to the prosecutor.

Respondent's default argument relies solely on the recollections of Strickler's co-counsel, Roberts, who had no memory

of the Stoltzfus documents. The district court found Roberts' recollection "much too vague and insufficient to create a genuine dispute" about disclosure of the Stoltzfus documents in view of all the evidence. Id. at 20. The district court reasoned:

> Roberts has failed to account for how he, unlike all the other participants in these trials, became aware of the plethora of information and impeachment material contained in the Stoltzfus documents. If Roberts was aware of the information contained in the Stoltzfus documents, one wonders why he and Bobbitt would have chosen not to use such powerful impeachment material on cross-examination to cast doubt on the credibility of Stoltzfus, a crucial witness for the Commonwealth.

Id. at 19-20. The district court's finding was not clearly erroneous.

Respondent also argues that the five undisclosed, Stoltzfus documents (exhibits 1 and 3-6) reveal no information not contained in the remaining three (exhibits 2, 7, and 8). A simple comparison of the documents themselves (R.App. at 2-20), the district court's summary of the documents (Pet. App. D at 6-11), and the summary of the Fourth Circuit refutes that claim (Pet. App. A at 13-14). Viewed collectively the Stoltzfus materials demonstrate that Stoltzfus fabricated much of the testimony she delivered at two trials, never witnessed any abduction, and perhaps was never even at the mall on the night Whitlock disappeared. Significantly, Stoltzfus was unable to identify Strickler or give any description of him or his clothing during her first police interview (exhibit 1: "Can't ID B/F, 1st W/M"). The jury never learned this damaging fact.

Both the district court and the Fourth Circuit also rejected

Respondent's assertion, offered again to this Court (Oppos. at RA 1, RA 21-22), that all the information in the eight Stoltzfus documents was contained in an interview Stoltzfus gave to an out-of-town newspaper just prior to Strickler's trial. As the district court found, and then the Court of Appeals noted, only one new fact was disclosed in that interview. App. D. at 21; App. A. at 10. Stoltzfus had contacted the victim's boyfriend and viewed photographs of the victim. The article contained "virtually none of the information contained in the Stoltzfus materials" App. D. at 21.

As the courts below concluded, Petitioner had no knowledge of the five critical documents contained in the Harrisonburg police files throughout state court proceedings. Respondent's assertions to the contrary must be rejected here as they were in the courts below.

III. The Suppressed Documents Were Material Under Brady.

The Court of Appeals held that the district court had erred in concluding that the Stoltzfus documents were material under Brady. Respondent argues here that the Court of Appeals was correct. Petitioner contends the lower court erred in applying a sufficiency of the evidence test, and its decision merits further review.

According to the Commonwealth, Stoltzfus was the only eyewitness to Whitlock's abduction and carjacking at the shopping mall. Petitioner's capital murder conviction was based on two predicate offenses--armed robbery, a valid predicate, and abduction with intent to defile, an invalid predicate. The prosecutor argued

to the jury that Stoltzfus' testimony demonstrated both predicates. The prosecutor argued that Strickler had a gun or a knife and held it against the victim as she drove from the parking lot. The prosecutor never argued to the jury, as Respondent now suggests (Oppos. at 14), that Strickler used a 69 pound rock to accomplish the armed robbery of Whitlock. Materiality must be assessed on the basis the state's case at the time of trial, not on some fanciful theory advanced years later. Kyles v. Whitley, 115 S. Ct. 1555, 1556 (1995)(materiality assessed in light of prosecution's evidence).

The Stoltzfus documents were material because their disclosure would have resulted in impeachment of Stoltzfus, the only eyewitness, and her testimony "would have been substantially reduced or destroyed." Id. at 1569. Use of the suppressed documents "could have fueled a withering cross-examination, destroying confidence in [her] story and raising a substantial implication that the prosecutor [or the police] had coached [her] to give it." Id. at 1570. Doubts about her testimony could have led to conviction for a lesser and noncapital offense.

The court charged the jury on both capital murder and first degree murder. The court set forth the elements of capital murder as follows:

> One, that the defendant killed Leanne Whitlock. And two, that the killing was willful, deliberate and premeditated and three, that the killing occurred during the commission of a robbery while the defendant was armed with a deadly weapon or occurred during the commission of abduction with intent to defile or to extort money or pecuniary benefit or was of a person during the commission of or subsequent to rape.

JA 425.

> One who is present aiding and abetting the actual killing who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

JA. 426 (emphasis added).

The court then set out the elements of first degree murder:

> One that Leanne Whitlock was killed. Two, that the killing was malicious. Three, the killing occurred in the commission of a robbery, rape or abduction. Four, that the defendant was a participant in the commission of this robbery, rape or abduction and five, that the defendant or another participant in the commission of this robbery, rape or abduction killed Leanne Whitlock.

JA. 427 (emphasis added).

Clearly any doubt about Strickler's role in Whitlock's murder would have resulted in acquittal of the capital murder charge and conviction of only first degree murder. A verdict on first degree murder was probable if the jurors had any doubt about whether an armed robbery occurred and whether Henderson or Strickler murdered Whitlock. The jury could find that Strickler had some role in an unarmed robbery based on his subsequent possession of the car and still acquit of capital murder. Moreover, had the Stoltzfus documents been available to defense counsel, counsel could have argued that the evidence demonstrated only that Strickler was an accessory after the fact to Henderson's murder of Whitlock. Possession of the car and credit cards proved nothing about the actual murder. Yet Respondent wrongly suggests that defense counsel would have presented the same defense even if he had been

given the Stoltzfus materials. As set forth in the Petition For Certiorari at 34, substantial evidence pointed to Henderson as the one who killed Whitlock. While Henderson fled the state, Strickler drove the stolen car around Virginia for a week and then returned to the vicinity of the murder, demonstrating an absence of guilt.

As the prosecutor recognized, Stoltzfus' testimony was critical. No other witness placed Strickler in the vicinity of Whitlock or her car during the time period when Whitlock was believed to have been at the mall. Despite widespread publicity about Whitlock's case (the probable source of Stoltzfus' information), no other witness came forward to report the very public events that Stoltzfus claimed to have seen. Likewise, no other witness saw Strickler with a knife or any other weapon before the murder. Without Stoltzfus' testimony, the jurors would have been reduced to speculation about Strickler's participation in both the armed robbery and abduction, the capital predicates.

The suppressed evidence concerning the prosecution's only "eyewitness" was material. This Court reiterated the established prejudice standard in Kyles, 115 S. Ct. at 1565:

> [F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [Citing United States v. Bagley, 473 U.S. 667, 682 (1985)].

Petitioner demonstrated prejudice. The Court of Appeals erred.

IV. THE APPLICATION FOR STAY OF EXECUTION SHOULD BE GRANTED.

The issue presented in Strickler's Petition for a Writ of Certiorari satisfies the conditions for a stay of execution. There is a reasonable probability that four Members of this Court will consider the issue sufficiently meritorious for a grant of certiorari, there is a significant possibility that this Court will reverse the decision below and reinstate the district court decision, and there will be irreparable harm if the execution is not stayed. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983). A stay should be granted to allow this Court to consider Strickler's petition with care in the normal course and not on the expedited schedule created by the Commonwealth's rush to execution.

CONCLUSION

The arguments in favor of review are compelling. Respondent has not challenged Petitioner's demonstration that the Circuit split concerning the existence and contours of a "due diligence" exception to the Government's Brady obligations has, as a result of the ruling below, become a chasm that threatens to swallow up significant Due Process rights. For the foregoing reasons, a petition for a writ of certiorari and the application for a stay of execution should be granted.

September 8, 1998

TOMMY DAVID STRICKLER

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CERTIFICATION

I hereby certify that two copies of the enclosed Reply Brief In Support Of Petition For A Writ Of Certiorari And Stay Of Execution were served by hand on counsel for Respondent, Pamela A. Rumpz, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on 9th of September, 1998.

Barbara L. Hartung

(6)

Court, U.S.
FILED
DEC 10 1998
OFFICE OF THE CLERK

No. 98-586

In The

Supreme Court of the United States

October Term, 1998

TOMMY DAVID STRICKLER,

Petitioner,

vs.

FRED W. GREENE, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 211

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STRICKLER V. GREENE, WARDEN
NO. 98-5864

RELEVANT DOCKET EVENTS

February 27, 1990	Indictment for Robbery Indictment for Abduction
April 23, 1990	Indictment for Capital Murder
June 18-21, 1990	Capital trial. Petitioner sentenced to death.
April 19, 1991	Convictions and death sentence affirmed by the Supreme Court of Virginia, Strickler v. Commonwealth.
December 5, 1991	Order appointing state habeas counsel.
August 27, 1992	Petition for writ of habeas corpus filed in the Circuit Court for the County of Augusta, Virginia.
September 10, 1993	Petition for writ of habeas corpus denied by order of the Circuit Court of the County of Augusta, Virginia.
December 8, 1993	Petition for Appeal from denial of state habeas petition filed in the Supreme Court of Virginia.
January 13, 1995	Opinion of the Supreme Court of Virginia affirming the denial of the writ of habeas corpus. Strickler v. Murray.
March 5, 1996	Petition for writ of habeas corpus filed in the U.S. District Court (E.D. Va.)

May 20, 1996	Amended petition for writ of habeas corpus filed in the U.S. District Court (E.D. Va.)
October 15, 1997	Final order and opinion granting petition for writ of habeas corpus.
June 17, 1998	Opinion of the United States Court of Appeals for the fourth Circuit reversing the grant of the writ by the district court. Strickler v. Pruett.
October 5, 1998	Order granting petition for writ of certiorari

---

State of Virginia, County of Augusta: February 27, 1990

IN THE CIRCUIT COURT OF THE SAID COUNTY:

The Jurors of the Commonwealth of Virginia in and for the body of the County of Augusta and now attending the said Court, UPON THEIR OATH PRESENT, that on or about the 5th day of January _____, in the year One Thousand Nine Hundred Ninety ___, in the said County of Augusta,

THOMAS DAVID STRICKLER did unlawfully and feloniously rob Leanne Whitlock of a motor vehicle and other personal property by violence to the person or by assault or by putting the said Leanne Whitlock in fear of serious bodily harm in violation of Virginia Code Section 18.2-58.

against the peace and dignity of the Commonwealth of Virginia.

Violation of Virginia Code § : 18.2-58 (Penalty defined therein)

This indictment is found on the testimony of

Sgt. W. C. Campbell
Capt. Duane Fairweather

Witness sworn in Court and sent before the Grand Jury to testify

February 27, 1990

/s/ Illegible,
Clerk

COMMONWEALTH
VS.
THOMAS DAVID STRICKLER

Indictment For

Robbery

Violation Va. Code § 18.2-58

A True Bill

/s/ Vincent J. Schindler
Foreman

State of Virginia, County of Augusta: February 27, 1990

IN THE CIRCUIT COURT OF THE SAID COUNTY:

The Jurors of the Commonwealth of Virginia in and for the body of the County of Augusta and now attending the said Court, UPON THEIR OATH PRESENT, that on or about the 5th day of January _____, in the year One Thousand Nine Hundred Ninety ___, in the said County of Augusta,

THOMAS DAVID STRICKLER did unlawfully and feloniously abduct Leanne Whitlock with the intent to extort money or other pecuniary benefit or with the intent to defile Leanne Whitlock in violation of Virginia Code Section 18.2-58.

against the peace and dignity of the Commonwealth of Virginia.

Violation of Virginia Code § : 18.2-48 (Class 2 Felony)

This indictment is found on the testimony of

Sgt. W. C. Campbell
Capt. Duane Fairweather

Witness sworn in Court and sent before the Grand Jury to testify

February 27, 1990

/s/ Illegible,
Clerk

COMMONWEALTH
VS.
THOMAS DAVID STRICKLER

Indictment For

Abduction with intent to extort pecuniary benefit
or with intent to defile

Violation Va. Code § 18.2-48

A True Bill

/s/ Vincent J. Schindler
Foreman

State of Virginia, County of Augusta: April 23, 1990

IN THE CIRCUIT COURT OF THE SAID COUNTY:

The Jurors of the Commonwealth of Virginia in and for the body of the County of Augusta and now attending the said Court, UPON THEIR OATH PRESENT, that on or about the 5th day of January _____, in the year One Thousand Nine Hundred Ninety ___, in the said County of Augusta,

THOMAS DAVID STRICKLER did unlawfully, feloniously, willfully, deliberately and with premeditation kill and murder Leanne Whitlock during the commission of robbery, rape or abduction with the intent to extort money or a pecuniary benefit.

against the peace and dignity of the Commonwealth of Virginia.

Violation of Virginia Code § : 18.2-31 (Class I Felony)

This indictment is found on the testimony of

Sgt. W. C. Campbell

Witness sworn in Court and sent before the Grand Jury to testify

April 23, 1990

/s/ Illegible,
Clerk

COMMONWEALTH
VS.
THOMAS DAVID STRICKLER

Indictment For

Capital Murder

Violation Va. Code § 18.2-31

A True Bill

/s/ Wm. F. Stansberry
Foreman

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF AUGUSTA.

COMMONWEALTH OF VIRGINIA

V.

THOMAS DAVID STRICKLER

The following is a transcript of the evidence presented at the Trial of the above styled case as transcribed from the dictaphone tapes taken from the machine operated by Ruth B. Riggs, heard before the Honorable Thomas H. Wood, Judge of said Court, on the eighteenth day of June, 1990. Motions, objections and exceptions are included as they occur during the progress of trial.

Present: A. Lee Ervin
Attorney for the
Commonwealth

Richard E. Moore
Attorney for the Commonwealth

William E. Bobbitt, Jr.
Attorney for the Defendant

Thomas E. Roberts
Attorney for the Defendant

Thomas David Strickler
Defendant

* * *

[38] JUDGE: Mr. Ervin are you ready to proceed in the case of the Commonwealth of Virginia against Thomas David Strickler?

MR. ERVIN: Yes Your Honor.

JUDGE: Mr. Bobbitt are you ready to proceed?

MR. BOBBITT: Yes sir we are.

JUDGE: Mr. Bobbitt do you have all witnesses available that you want to have available?

MR. BOBBITT: We believe so Your Honor. Some are summonsed [sic] to be here on a later date but we . . .

JUDGE: Are you ready to proceed at this point?

MR. BOBBITT: We are ready to proceed at this time.

JUDGE: All right Mr. Strickler would you confer with your attorney concerning your plea to the charges and then step over to the Clerk's desk to be arraigned?

CLERK: The jurors for the Commonwealth of Virginia in and for the body of the County of Augusta, are now attending in the said Court and upon their oath present. On or about the fifth day of January, in the year one thousand nine [39] hundred and ninety, in the said County of Augusta, Thomas David Strickler did unlawfully and feloniously abduct Leanne Whitlock with the intent to extort money or other pecuniary benefit or with the intent to defile Leanne Whitlock in violation of Virginia Code Section 18.2-48. What say you to the charge in this indictment, are you guilty or not guilty?

MR. STRICKLER: Not guilty.

CLERK: The plea is not guilty Your Honor. The jurors of the Commonwealth of Virginia in and for the body of the County of Augusta are now attending in the

said Court and upon their oath present. On or about the fifth day of January, in the year one thousand nine hundred and ninety in the County of Augusta, Thomas David Strickler did unlawfully and feloniously rob Leanne Whitlock of a motor vehicle and other personal property by violence of the person or by assault by putting the said Leanne Whitlock in fear of serious bodily harm in violation of Virginia Code Section 18.2-58. What say you to the charge in this indictment, are you guilty or not guilty?

MR. STRICKLER: Not guilty.

CLERK: The plea is not guilty Your [40] Honor. The jurors of the Commonwealth of Virginia in and for the body of the County of Augusta are now attending in the said Court and upon their oath present. On or about the fifth day of January, in the year one thousand nine hundred and ninety, in the said County of Augusta, Thomas David Strickler did unlawfully and feloniously and willfully and deliberately and with premeditation kill and murder Leanne Whitlock during the commission of a robbery, rape or abduction with the intent to extort money or pecuniary benefit against the peace and dignity of the Commonwealth of Virginia in violation of Virginia Code Section 18.2-31. What say you to the charge in this indictment, are you guilty or not guilty?

MR. STRICKLER: Not guilty.

CLERK: The plea is not guilty Your Honor. Please raise your right hand. You shall answer truthfully and honestly the questions propounded to you by the Court. Mr. Strickler we are about to call a jury forward to decide this case. If you wish to challenge (inaudible).

* * *

[41] JUDGE: Ladies and gentlemen you have all been called here today to serve as jurors in [42] the case of the Commonwealth of Virginia against Thomas David Strickler. This is a criminal case. The defendant stands indicted for the offenses of abduction with the intent to defile or to extort money or other pecuniary benefit, capital murder and robbery. The indictment in this case alleges that all of these offenses were committed in Augusta County by the defendant on or about January 5, 1990. The defendant has entered a plea of not guilty to these charges and a jury has been called to hear the case.

* * *

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

[443] JUDGE: Thank you Mr. Roberts. Mr. Ervin you want to call your first witness?

MR. ERVIN: Call Ms. Whitlock.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Ms. Whitlock would you state your full name please?

A. Esther Whitlock.

* * *

[445] Q. When was the last time you saw Leanne?

A. I saw Leanne on the Saturday before she died.

Q. Ms. Whitlock let me show you this photograph and ask you if you recognize that?

A. That is Leanne.

Q. That was Leanne?

A. That's my daughter.

MR. ERVIN: Judge I would offer this as Exhibit Number One.

JUDGE: Commonwealth's Exhibit One.

MR. BOBBITT: No objection Your Honor.

JUDGE: The photograph will be marked Commonwealth's Exhibit One and will be admitted into evidence.

MR. ERVIN: Ms. Whitlock I know it is difficult for you today. Sometime after January 13th, did you go to the Medical Examiner's Office?

A. Yes I did.

Q. And did he show you a body of a young woman there?

A. He did.

Q. And whose body was that?

A. The body was that of Leanne.

Q. Leanne. Ms. Whitlock let me show [446] you, ask you if you recognize these earrings?

A. These earrings belong to me.

Q. Where did you get them from?

A. I have had these earrings for years and years. More than likely I either bought them or I might have borrowed them from my mother or mother-in-law and kept them and never returned them.

Q. Who was the last person that you saw have these earrings?

A. Leanne.

Q. Are you sure these are the earrings?

A. They are my earrings.

MR. ERVIN: Judge we would offer these for identification purposes as Exhibit Number Two.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objection Your Honor.

JUDGE: These earrings will be marked Commonwealth's Exhibit Two for purposes of identification.

MR. ERVIN: So Ms. Whitlock let me show you a watch and ask you if you recognize it?

A. This watch is Leanne's (inaudible).

MR. ERVIN: I'm sorry I couldn't hear you.

A. It belongs to Leanne.

[447] Q. It belonged to Leanne?

A. Yes.

MR. ERVIN: Judge I would ask that this be marked Number Three for identification.

JUDGE: Any objection?

MR. BOBBITT: No objection.

JUDGE: The watch will be marked Commonwealth's Exhibit Three for purposes of identification.

MR. ERVIN: Ms. Whitlock this is Mr. Bobbitt, he may have some questions for you today.

MR. BOBBITT: No questions.

JUDGE: All right Ms. Whitlock.

MR. ERVIN: Your Honor may this witness be excused?

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objections.

MR. ERVIN: Thank you.

JUDGE: You are excused Ms. Whitlock.

MR. ERVIN: Call John Dean, John Dean.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. John would you state your full name please?

[448] A. John Thomas Dean.

Q. And where do you live?

A. I live in Harrisonburg.

Q. Are you employed?

A. Yes sir.

Q. And where do you work?

A. I work for the Foot Locker at the Mall.

Q. And how long have you worked out there?

A. Since August of 1989.

Q. Did you know Leanne Whitlock?

A. Yes I did.

Q. And how long had you known Ms. Whitlock?

A. Since about the same time.

Q. What was your relationship with Ms. Whitlock?

A. Well she was my girlfriend. We had been dating since September.

Q. John I will direct your attention to the January 5th of 1990, did you see Ms. Whitlock that day, that evening?

A. Yes sir I did.

Q. Approximately what time did you see her?

[449] A. I last saw her approximately around four-thirty that evening.

Q. Where did you see her at?

A. In the Mall.

Q. And how did you happen to see her?

A. Well she had came early that day and was just hanging around, waiting on one of her friends and they were going to go out, she was going to get her paycheck from where she worked at and so she wanted to use my car so I let her use my car.

Q. What type of car did you have?

A. A 1986 Mercury Lynx.

Q. O.K. And how long had you had the car?

A. Since about three years.

Q. Did you let Leanne have your car to use?

A. Periodically.

Q. How about that day? Did you let her have it?

A. I let her use it, she was going to . . .

Q. When was she suppose to bring the car back to you?

A. Well after she got through with her [450] errands which would probably be like within an hour or two, something like that.

Q. And did she come back with your car?

A. No sir she didn't.

Q. When was the next time that you saw your car?

A. The next time I saw my car was actually about Tuesday, the next time I saw my car in person was about a month after it happened or something like that.

Q. Did you ever see Ms. Whitlock alive again after she took the car?

A. No I didn't.

Q. John let me show you these two photographs and ask you if you can identify these?

A. Yes sir.

Q. Are those accurate photographs of your vehicle?

A. Yes they are.

MR. ERVIN: Judge we would offer these as Exhibits Number Four and Number Five.

JUDGE: Any objections?

MR. BOBBITT: No sir.

JUDGE: All right. Gentlemen these two photographs will be marked Commonwealth's Exhibit Four

and Five, both will be admitted into [451] evidence. All right.

MR. ERVIN: Judge may I see the photographs again please? John these photographs show a lot of mud and dirt around the bottom of your car. When you loaned your car to Leanne Whitlock was that mud and dirt around your car like that?

A. No it wasn't.

Q. Was your car very clean?

A. No audible answer.

MR. ERVIN: Judge may these be passed around to the jury so they can be seen?

JUDGE: Yes sir.

MR. ERVIN: John you said you worked for Foot Lockers, is that correct?

A. Yes it is.

Q. And where is that located?

A. In the Valley Mall.

Q. Is that the Mall in Harrisonburg?

A. Yes it is.

Q. And you indicated that Ms. Whitlock had been out there for part of the day (inaudible)? When did Ms. Whitlock get there, do you remember approximately?

A. It was around four.

Q. And approximately what time did you [452] last see her when she left?

A. Four-thirty.

Q. Four-thirty. John this is Mr. Bobbitt, he may have some questions.

MR. BOBBITT: Mr. Roberts has some questions.

CROSS EXAMINATION

BY MR. ROBERTS:

Q. Mr. Dean let me just ask you two things. One is I missed when you began working at the Foot Locker?

A. When I began working at the Foot Locker?

Q. How long did you work at the Foot Locker?

A. I have worked at the Foot Locker here since August of '89.

Q. August of '89. O.K. I know this has been a very unpleasant ordeal for you but one question I must ask you. Did you have sexual intercourse with Leanne the night before she disappeared?

A. Yes I did.

MR. ROBERTS: That's all Judge.

* * *

[454] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Sonja would you state your full name please?

A. Sonja Lamb.

Q. You O.K.?

A. Yes.

Q. And what city do you live in?

A. Richmond, Virginia.

Q. Back in January of 1990, where were you living?

A. I was staying with Leanne Whitlock in an apartment at Madison Gardens.

Q. And how close is that to JMU?

A. It is about a five minute walk.

Q. Are you a student at JMU?

A. Yes.

Q. And how long have you been there?

A. Two years.

Q. Ms. Lamb I take you back to January 5th of 1990, do you remember that day?

A. Yes.

Q. Did you and Leanne do things together that day?

A. I went to work and Leanne stopped by [455] to see me. I got off at three-thirty and we were going to the movies afterwards. I met her at Foot Locker where she was and we went to the movie theater but the movie we were going to see had already started so we decided to go to the seven o'clock movie. Then we went to John and got his car keys and we left the Mall and went to K-Mart to pick up Leanne's paycheck. From there we went to

Grand's Furniture Store and we looked around the furniture store for a while and then we went back to our apartment.

Q. About what time did you get back to the apartment?

A. I would say about five o'clock.

Q. And did you all stay there the rest of the evening?

A. No. When I got back to the apartment (inaudible) Leanne went upstairs and she talked to her mother on the phone. She came back downstairs and we talked for a while and she went to Burger King with Beth (inaudible). I guess that was about maybe six o'clock, six ten. Then we came back and then Beth and Leanne came back and she ate and about six-thirty, maybe quarter 'till seven she left to give John back his car.

Q. O.K., who left to give John back his [456] car?

A. Leanne left the apartment to give John back his car and when she left she said after I pick up John, she was coming back to the apartment to get me because we were going back over to John's to look at a movie for that evening.

Q. Do you remember what Leanne was wearing when she left? If you don't that is O.K.

A. Black and green plaid pants, black shoes, she had on a pair of pearl earrings, I believe it was a creme top. And she had a black pocketbook and a jean jacket.

Q. O.K. Say she had on a pair of pearl earrings Sonja?

A. Yes sir.

Q. Let me show you Exhibit Number Two and ask you if you recognize those?

A. Yes.

Q. And whose are those?

A. These belong to Leanne.

Q. Are these the earrings that she was wearing when she left the apartment?

A. Yes sir.

MR. ERVIN: Judge at this time I would ask that Exhibit Number Two be introduced into [457] evidence.

JUDGE: Any objections?

MR. BOBBITT: No objections.

JUDGE: Exhibit number, Commonwealth's Exhibit Two which was an exhibit which has previously been marked Commonwealth's Exhibit Two, will be admitted into evidence.

MR. ERVIN: After Leanne left the apartment, did you ever see her alive again?

A. No.

Q. When she first borrowed John's car, were you with her then?

A. Yes.

Q. And did you ride in the car?

A. Yes.

Q. Let me show you Exhibits Number Four and Five and ask you if you recognize that car?

A. This is John's car.

Q. O.K., now these pictures show quite a bit of mud and dirt on the bottom of the car, did it have all that mud and dirt on it when you all got it?

A. No.

* * *

[459] MR. ERVIN: Call Beth Rogers.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Beth would you state your full name please?

A. Bethany Rogers.

Q. Are you a little bit scared? How old are you Beth?

A. Twenty-one.

Q. Do you work any place?

A. Yes I do.

* * *

[461] Q. And now Beth I want to go back to January 5th of 1990, what did you do that day?

A. I hadn't done a lot. I was laid off work. I don't remember all of what I did that day.

Q. O.K. Later on that evening, did you do anything with Leanne?

A. Yes, she had to go get gas in her boyfriend's car and I had to go with her and keep her company and after we went to get gas, we decided to go to Burger King and get something to eat.

Q. And did Leanne get something to eat?

A. Yes she did.

Q. What did she get to eat?

A. I believe it was a cheeseburger and french fries.

Q. Cheeseburger and french fries. Did you all eat there at the place or what?

A. No we took it back to our apartment and ate there.

[462] Q. O.K. And about what time did you all eat?

A. Probably about six-thirty.

Q. Did you all stay there the rest of the evening?

A. No she left about quarter 'till seven or ten minutes 'till seven to go pick up her boyfriend at the Mall.

Q. Did you go with her?

A. No I stayed at the apartment.

Q. Did anybody go with her?

A. No she was alone.

Q. Do you remember what all she was wearing when she left?

A. She was wearing a creme colored sweater, some dark pants and a dungaree jacket.

Q. Say you all went over to Burger King (inaudible)?

A. Yes.

Q. What vehicle did you go in?

A. I don't remember the make and model of the car. It was a light blue. The car belonged to her boyfriend.

Q. Let me show you Exhibits Four and Five and ask you if you recognize these?

A. Yes, that was his car.

* * *

[464] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Ms. Warner would you state your full name please?

A. Donna Lynn Warner.

Q. And do you live around here?

A. I live in (Inaudible).

Q. West Virginia?

A. Yes.

Q. Ms. Warner do you know Ronald Henderson?

[465] A. Yes I do.

Q. How long have you known Mr. Henderson?

A. Since Kindergarten.

Q. Direct your attention back to January the 5th of 1990. Do you remember that day?

A. Yes.

Q. O.K. And did you and your parents come over to Virginia?

A. Yes.

Q. For what purpose?

A. We came over to do some shopping.

Q. And where did you all go shopping at?

A. We were at the Mall.

Q. Valley Mall?

A. Yes.

Q. O.K. While you were there did you see Mr. Henderson?

A. Yes I did.

Q. Was anybody with Mr. Henderson?

A. Yes.

Q. And did that person introduce himself to you?

A. Ronald was the one that had [466] introduced us.

Q. About what time was this that you ran into Mr. Henderson and his friend?

A. A little before three o'clock.

Q. And how long did you talk with him?

A. Until four or a little after four.

Q. The friend that was with Mr. Henderson, is he in the Courtroom today?

A. Yes he is.

Q. And where is he seated?

A. Right there.

Q. In the white shirt?

A. Yes sir.

MR. ERVIN: Judge I would ask that the record show that she identified the defendant.

JUDGE: So ordered.

MR. ERVIN: O.K. This is Mr. Roberts and Mr. Bobbitt. They may have some questions for you.

MR. BOBBITT: No questions.

JUDGE: Thank you Ms. Warner.

MR. ERVIN: Thank you Ms. Warner, appreciate it.

JUDGE: Is she free to go?

MR. ERVIN: Yes sir.

JUDGE: Ms. Warner you are free to go.

[467] MR. ERVIN: Thank you. Call Virginia Smith.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Virginia Furr Smith.

Q. And your occupation?

A. I'm head of security at Valley Mall.

Q. How long have you had that position?

A. Four years.

Q. O.K. Direct your attention back to January 5th, 1990, were you working that evening?

A. I was.

Q. And who all was working with you, do you remember?

A. Up until six o'clock I was by myself, after that there was a Eddie (Inaudible), Joe Henkle and I believe Andrew Wright.

Q. During that afternoon, did anything unusual or suspicious happen for you?

A. Yes at approximately three-thirty to four o'clock, I received a report about two males that was trying to steal a white Continental on [468] the DMV side of the parking lot.

Q. What did you do in response to this?

A. I proceed to DMV parking lot and I hunted for the suspects and I could not find them.

Q. So what did you do after that?

A. I checked all the rest of the Mall, the parking lot. Then I went back inside and did locate the two people that was described to me.

Q. And after you located them, what did you do?

A. I spent time watching them.

Q. About what time did you first see them?

A. The first time I saw these two and I observed them earlier between one-thirty to two-thirty, somewhere along in there.

Q. And you say you started watching them that afternoon? About what time did you start watching them?

A. Really not until about three-thirty or four o'clock after I made the check on the parking lot and came back in. So it was probably quarter 'till five, five o'clock when I actually got down to watching them serious.

Q. Where were they located in the Mall?

A. They was at the Golden Chain Gang [469] when I came back in and found them which is a little jewelry place there in the middle of the Mall.

Q. How close is that to the Foot Locker Store?

A. It is about half-way between the Mall.

Q. What did you do after you located the two men?

A. I backed into (Inaudible) Shoes and talked to the manager and employees there and watched them go from the Chain Gang to Music Land. I watched them there for about fifteen or twenty minutes. They were just looking around. From there I went back to the Security office and met the crew that was coming on.

Q. And why did you do that?

A. I always meet the crew, we go over things that happened through the day. I wanted to point the two fellows out to them as we were making the rounds.

Q. Did you point these two fellows out?

A. No I did not.

Q. Why was that?

A. Because when I went (inaudible), we had one guard starting that night and I was making [470] rounds with him, couldn't find them. We went completely through the Mall, checked all the parking lots, came back in the Food Court and I went in to check the ladies restroom and came back out and did spot them at that time in the Food Court.

Q. About what time was this?

A. Some place I would say, quarter 'till seven, maybe even seven.

Q. How long were you able to keep them under observation?

A. Very shortly.

Q. What happened?

A. I think they knew that I was watching them also and they taken off out of the Food Court while I went to get the one guard. I wanted to show them to him and headed up the Mall and I lost them.

Q. You say this was about fifteen 'till seven the last time you saw them?

A. Somewhere along there.

Q. Virginia did you get a good look at them?

A. Yes I did.

Q. Is either one of these two men in the Courtroom today?

[471] A. Yes.

Q. And where is that person seated?

A. Sitting right there between the two gentlemen.

MR. ERVIN: Judge I would ask that the record show that the witness identified the defendant.

JUDGE: So ordered.

Q. Do you remember what this man was wearing that night Virginia?

A. Yes he had jeans, a jean jacket on, the jacket had a tear in the left (inaudible) seam four to five inches long.

Q. O.K.

A. Some kind of emblems on the back.

Q. How about, could you see his shirt.

A. No I did not notice his shirt.

Q. How about the shoes?

A. No I did not pay attention to his shoes. His dirty blonde hair, his wild eyes, he had a beard.

Q. He had a beard at that time?

A. He did, like he hadn't shaved for four or five days.

MR. ERVIN: O.K. Virginia this is Mr. Bobbitt. He may have some questions for you.

[472] CROSS EXAMINATION

BY MR. BOBBITT:

Q. Ms. Smith I notice that you have got a notebook in your hand with some notes in it, are those notes that you have taken about incidents you have just talked about?

A. I always take notes on any kind, anything unusual that is reported to me, yes.

Q. When did you make those notes?

A. I made these notes late that night.

Q. You talking about January 5th?

A. Yes.

Q. And where do you keep the notes?

A. I usually keep them in my file cabinet or in my desk drawer at the Mall.

Q. Do you have any independent recollection of what you just talked about or is it all from your notes?

A. No most of it I know in my head. Some of it, the times, you know, sometimes it can get pretty hectic at the Mall.

Q. I'm just trying to determine how much you are reciting from notes and how much you actually remember. During the time that you were watching the two men, did you see anybody else [473] with them?

A. No I did not.

Q. Did you ever see a girl with them?

A. No I did not.

Q. And you watched them from a period of about, you said, one or two o'clock and then seriously stared watching them around four or five o'clock up until . . .

A. Somewhere along there, in passing, I was making rounds through the Mall. I had stopped watching for fifteen, maybe twenty minutes or more and make a round.

Q. And then quarter 'till seven was the last time . . .

A. The last time I saw them was in the Food Court.

Q. The Food Court?

A. Yes they was headed out and around up toward the north end of the Mall.

MR. BOBBITT: I don't have any other questions.

MR. ERVIN: Judge may I have one moment?

[474] REDIRECT EXAMINATION

BY MR. ERVIN:

Q. Virginia let me show you this large photograph and ask you if you recognize that?

A. Yes it is an aerial photo of the Mall and surrounding areas.

MR. ERVIN: Judge I would offer this as Exhibit Number Six.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objections.

JUDGE: This photograph of Valley Mall will be marked as Commonwealth Exhibit Six and will be admitted into evidence.

MR. ERVIN: Virginia you say that the two men were inside headed to the northern area of the Mall. Which way were they headed?

A. O.K. This would be the main entrance here so it would be, they came out of the Food Court and turned up the Mall.

Q. So they were going up this way the last time that you saw them?

A. Yes up toward J.C. Penney. If they had made a right they would have came to the main entrance and if they made a left they would have went to Watson's.

* * *

[476] MR. ERVIN: Call Anne Stolzfus.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Ann would you state your full name?

A. I'm Anne (Inaudible) Stolzfus.

Q. And Anne you were sworn in at the beginning?

A. Yes I was.

Q. Anne I want to take you back to January 5th of 1990, (inaudible), do you remember where you were?

A. Yes I do.

Q. Where did you go first?

A. Where do you want me to start? I started at JMU (inaudible), picked up my daughter and we headed out to the Mall.

Q. O.K., how old is your daughter?

A. My daughter is fourteen years old.

Q. And what were you going to the Mall for?

A. We first went to K-Mart to get a [477] prescription filled and I paid for that at 5:35, and headed over to the Mall and we were looking for a CD Disc for my daughter. We were having Christmas late for my oldest daughter who is a college student. And we went down to Music Land about six o'clock.

Q. What happened then?

A. Well I was waiting for a tall black gentlemen who is a clerk in the store. I think his name was Rob, I'm not sure. And he was, I was told he was the expert so I waiting to be waited on and a blonde girl and a man that I call "Mountain Man" came in, he was very impatient and I just sort of instinctively backed up because I was frightened and backed into a tall dark haired fellow that I call "Shy Guy" because he seemed a bit shy. And I apologized, of course, and then told Rob to go ahead and wait on "Mountain Man" because he seemed very impatient and revved up. And . . .

Q. What happened after that? Did you have any conversation with any of these people?

A. At that point, no I didn't have any conversation at that point. I do remember when I backed up into "Shy Guy" I bumped against his coat, he had a tan coat, draped over, a long coat [478] draped over his arm and I remember feeling, I thought I felt something hard in the coat and he seemed kind of defensive and quickly put it on.

Q. How about "Mountain Man", how was he dressed? Do you remember?

A. I remember how they were dressed. O.K., "Mountain Man" had a kind of multi layer look. He had a grey T-shirt and it had Harley Davidson across the front and, O.K., you must understand, my memory is a little vague. I remember some kind of open flannel shirt, maybe a grey greenish plaid and then over that was a denim jacket that had writing on the back in red and very brightly colored embroidery, I'm not sure if it was a colorful bird or maybe two flags that were crossed like that. And I am not sure about his shoes. He may have some kind of cowboy boots on. The girl had denim jeans on and a white top that had buttons down the front and white sneakers and the "Shy Guy" I am more vague about how he was dressed. Although his appearance was neater. He had either a white or a light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort, I'm not [479] sure.

Q. O.K. (Inaudible). The two men, did you get a good look at both of them at that time?

A. Oh yes, I certainly did.

Q. The pants that they were wearing, were they clean or did they have mud and dirt all over them, could you tell?

A. "Mountain Man" looked a little bedraggled but no they weren't dirty.

Q. Not at all?

A. No.

Q. About what time was this that you first ran into them?

A. That was six o'clock.

Q. And did you have any conversation with any of them?

A. Not at that point.

Q. O.K., what happened then?

A. O. K., What happened then was that Rob left the store and I was told that he took his supper break and I was to come back in a half an hour. I came back at six forty-five and it turned out that (inaudible) and that was a mistake. But as I am heading back down the central part of the Mall toward Music Land again which is a store on the right, first toward me came "Shy Guy" walking [480] by himself and then the blonde girl came next and then "Mountain Man" and he was calling her and keep yelling, my memory was Donna, Donna, Donna and I turned to

her and said are you Donna? And she said well Donna or Sharon, is my memory of what she said. And I said well he wants you and so she turned around to talk to him. And I stopped in my tracks because he was so revved up that I was concerned. I was, it just caught my attention and I had a concern. And so I just watched them momentarily and he said, you know, first he said where is Ronnie and she said up there. And then he said I've got to get out of here and she said you and Ronnie go and meet me at the bus stop and she turned, she turned and started walking up toward the bus stop again and then turned around, he was calling her again. Anyway she smacked right into me. Her button caught in my open weave sweater which is why I remember her attire. And so I got a very close look at her face and she asked me then where the bus stop was and I told her, which was just out of the front entrance to the Mall.

Q. Now Anne you said this "Mountain Man" was wearing a grey shirt with the insignia of Harley Davidson on it?

[481] A. That's my memory, yes.

Q. Let me ask you if you recognize this shirt?

A. That could have been it. Like I say it was under two other layers so I just saw the front.

Q. But this "Mountain Man" was wearing a shirt like this?

A. Right.

Q. Black over grey with a Harley Davidson on it?

A. Grayish, right.

Q. Do you see any difference between this one and the shirt that he was wearing that day?

A. It has been a long time.

MR. ERVIN: Judge I would offer this into evidence as Exhibit Number Seven.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objections.

JUDGE: The Commonwealth, the T-shirt will, the shirt will be marked Commonwealth Exhibit Seven and will be admitted into evidence.

MR. ERVIN: So after the . . .

MR. BOBBITT: Mr. Ervin, I'm sorry . . .

MR. ERVIN: I'm sorry Judge. After [482] these two people left, three people left, what did you do?

A. The first thing I do, "Shy Guy" and "Blonde Girl" comes up towards the Mall entrance where the bus stop was and "Mountain Man" headed around the (inaudible) display, he moved around the display on the other side. And the first thing I did was try to follow them because again I was concerned about his behavior. And I lost him. So I went back into the Music Land which was where I had been headed, I learned that Rob wasn't back yet and people there didn't have the knowledge to be able to help me. And so we just went on out to where my car was parked.

Q. What . . .

A. O.K.

Q. What happened after that, who all went out to your car?

A. My fourteen year old daughter and I.

Q. And what did you all do?

A. O.K. I planned to take my daughter back around to Leggetts to go back inside to show her some earrings so we headed, we were, I don't know if people are familiar with Valley Mall but we were in one corner . . .

Q. O.K., let me show you this [483] photograph, Exhibit Six, the Valley Mall and Route 33. Do you recognize this?

A. Right.

Q. O.K. And what happened next?

MR. BOBBITT: I'm sorry I didn't see where she pointed.

MR. ERVIN: (inaudible).

A. I went, I was parked, I was parked in the lot between J.C. Penney and Watson's, over here. O.K. And I drove in front of Penney's, right there is a stop sign. O.K., I stopped there because there was a car coming in here, I don't know which direction the car had come. But the car was just driving in here to the front Mall entrance. And the car that I saw driving in was a shiny dark blue car and of course, college was going to be starting Monday and so my instinct was here comes a rich college kid, is what I thought because she was beautiful. She was well dressed and she was happy, she was singing and . . .

Q. And did you get a good look at the woman that was driving?

A. Absolutely.

Q. Could you describe her for the jury?

A. Like I said, she was beautiful, she looked bright eyed, I assumed she was a college [484] student. She was black, she had, she did not wear glasses. She had . . .

Q. Let me show you Exhibit Number One and ask you if you recognize that?

A. Yes that is her.

Q. This is the woman you saw that day?

A. Yes.

Q. O.K., so you all, you were stopped at the stop sign right in here?

A. Right.

Q. What happened then?

A. We waited for her to come past and then I pulled, turned right and came up to the Mall entrance. The first thing, O.K., she stopped so I had to stop. Now the first, there was a vehicle in front of her that was also stopped and in front of that was, my memory is like a grayish mini van that had dropped off some, maybe high school age kids and it was waiting to leave. O.K., and the next thing that I saw was, "Mountain Man" came tearing out of the Mall entrance door and went up to the driver of the van and it looked like he was talking to him and then was just really mad and ran back and banged on

back of the backside of the van and then went back to the Mall entrance wall where "Shy Guy" and "Blonde Girl" [485] was standing. O.K., so then we left and there was a white pick-up truck in front of the black girl's car, may I call her Leanne now that we know that she is Leanne?

MR. ERVIN: (Inaudible).

A. O.K. In front of, O.K., in front of my car was Leanne's car and in front of Leanne's car was a white pick-up truck that was waiting for this van. The van left, the white pick-up truck pulled in front to turn left into the parking lot to park. And in fact, did that and well, O.K., before the, before the van, before the pick-up truck turned left, "Mountain Man" came out again to the O.K., he had pounded on the back of the bus and had gone back and then came up to the pick-up truck, this is the passenger's side of the pick-up truck. There was an older man and, appeared to be his wife and a teenage boy, appeared to be his son, in the pick-up truck and he just ran up to them, just look like, I don't know, nothing happened and came back immediately and pounded on Leanne's passenger's window.

Q. What happened then?

A. O.K., and he tried to, O.K., the pick-up truck then went into park. O.K., he shook and shook the car door and it seemed like it was [486] locked. And then he goes banging and banging on the window and she kind of leaned over and it then it looked as if she was actually making sure that the door was locked because then he yanked on the door again and it wasn't opened. And then he just really shook it hard and you could tell he was mad. Shook it really hard and the door opened and he

jumped in. Now this was a small car that had two, like two, appeared to be two bucket seats in the front and he jumped into the middle which is a little weird, you know, so I am trying . . .

Q. What he do . . .

JUDGE: Ms. Stolzfus I am going to ask you to try to tell us what you heard without any comments.

MR. ERVIN: What did he do when he jumped into the car?

A. He just jumped into the middle of the car and faced her. There was some conversation and at first she kind of, you know, went like she was trying to push him away and then he got back over, he just moved back over and opened the passenger door and motioned for "Blonde Girl" and "Shy Guy" to come and "Blonde Girl" came, started to jump into the car, put her left foot up into the car and Leanne stepped on the gas [487] and honked the horn and just laid on the horn. The horn must have blown, blew a long time and she couldn't go because the three people who had been in the pick-up truck were now walking from the parking lot in front of her car into the Mall. O.K., but when she stepped on the gas to go forward, the "Blonde Girl" jumped back and of course didn't get into the car and so she is just laying on the horn now and "Mountain Man" started hitting her and hitting her . . .

Q. "Mountain Man" was hitting who?

A. Leanne Whitlock.

Q. Where was he hitting her at?

A. Well he started hitting her. It looked like he was just hitting her on the left shoulder, her right shoulder and then it looked like to me that he started hitting her on the head and I was, I just became concerned and upset. So I beeped, honked my horn and then she stopped honking the horn and he stopped hitting her and opened the door again and the "Blonde Girl" got in the back and "Shy Guy" followed and got behind him. When "Shy Guy" got in the back of the car, as he got in he handed his long tan coat over the front seat to "Mountain Man". O.K., "Blonde Girl" and "Shy Guy" got in the back and they were [488] sitting turned in their seats, kind of in an huddle with Leanne, you know, as if they were buddies or something. So "Shy", excuse me, "Mountain Man" had taken the coat and was bent over, you know, put the coat down in the floor and fiddled with it, what seemed like a long time, fiddled with the coat. After he was done fiddling with the coat, he sat back up and again he faced Leanne and the other two in the back seat sat back and relaxed.

Q. What did you do then?

A. O.K. Well O.K., well I am still waiting to go so now they look like they are all, you know, ready to go and nothing is happening and Leanne is not (inaudible) the car is still running. O.K. so I beeped the horn. Just like, let's go, and nothing happened so you know, I, it just seemed strange so I didn't, you know, O.K., so I what I did was pulled up parallel, O.K., she is here and I pull up parallel and then I got out of the car, I tried, first I tried to get her attention and she was just like a manikin, just totally frozen. I could not get her to look at me or to respond. So I jumped out of the car, started to walk

around, "Shy Guy" quick, instinctively jumped, you know, laid over on the [489] seat to hide from me and the blonde girl starts ribbing him to get up and I was afraid to tell you the truth and I got back into my car and just pulled front a little bit, just like that, so that I could get a better view of Leanne.

Q. Did you say anything?

A. Yes I did. I said to her, well of course I am in my car and she is in her car, but I leaned front so my daughter wasn't in the way and I said three times to her, are you O.K., so that she could very clearly see that I was saying, are you O.K.

Q. And what was her response?

A. I was very frustrated because I didn't understand her response. Every time I said that, she would look at me, just have direct eye contact and then look down. Just very serious, looked down to her right. I couldn't figure it out.

Q. What happened then?

A. So I still (inaudible) I wasn't getting an O.K., I wasn't getting feedback that she was O.K., so I pulled front a little bit more and again waived and said, are you O.K., and it was like please talk to me. And she just mouthed a word which again I couldn't figure out what it [490] was and I pulled, I just thought, oh well, and I started to drive off and I drove just a couple car lengths forward to where that pick-up is and then I just parked because it just hit me what she said. Now I will just show you how she mouthed. She just went . . .

Q. Is that how she did?

A. O.K., yes. Now she didn't smile, there was no expression. She didn't move. It was just, and when I hit, when I got up to Medco Drug, I said to my daughter, I think she said help. It was the only think that that movement could be. It is the only word that it could possibly be, was help.

Q. What did you do then?

A. O.K. I said to my daughter, my fourteen year old daughter, now you must understand this is about seven o'clock at night and we haven't had supper yet and you know, I said to my fourteen year old, go in quick and get the Security and she didn't want to and I am there arguing with her. Well I don't want to go, I want to see what happens here because she said help, I'm sure, you know, I think she did, I'm not.

Q. Well what happened then?

A. O.K. Well about that time, we were [491] there just a few, just a short time when Leanne then just drove by me very slowly in the car with these people in it, drove around, I can show you on here. O.K. The Mall entrance is right there and . . .

Q. And is that where all this happened, is right there?

A. Right, at the Mall entrance. Medco Drug is here so I just pulled up to Medco Drug and she then came around and drove past me very slowly, came up around the corner here, O.K., I will tell you tell the details of what happened here, they basically went out here to this stop sign and then turned left out here.

Q. What happened (inaudible)?

A. When she came around, when she came past me and she came around the corner, and I am still sitting there trying to figure out if she is O.K. or if she isn't O.K., she came around the corner, it seemed like she stepped on the gas and then she went up over the curb and now the curb is about that high and so the car really tilted and also she laid on the horn again. And I said we have got to follow her. So I quickly drove up behind her and I said to my daughter, I had a 3 x 4 index card in the car and I said to my fourteen [492] old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, No Kids Alone 243, and I said remember, 243 is my age.

Q. What was the license number?

A. NKA 243, West Virginia.

Q. NKA 243. Let me show you Exhibits Four and Five and ask you if you recognize the vehicle in these photographs?

A. Yes that is John Dean's car. (Inaudible).

Q. Now the car has quite a bit of mud and dirt on it . . .

A. The mud was not there when I saw it, it was, it looked like it was a brand new car, it was real shiny.

Q. And which direction was this car going the last time you saw it?

A. Well west, east basically.

Q. Which way did it go?

A. O.K. It went up over the curb here and I followed it. We came out here to the stop sign and it turned left, the first thing that she did is headed in this lane as if she was going back to Harrisonburg and I (inaudible). She was going back to Harrisonburg and I was going to [493] follow her then I, she changed lanes and, and headed out here, out 33 east toward Elkton. Now it was dark and I had a empty gas tank, I had three kids at home waiting for supper . . .

Q. (inaudible)?

A. I decided not to follow her at that point, I don't know Elkton area and I didn't have any gas and I didn't have any money to get gas so I decided to turn right and go around and call the police. And we headed back to the, back around to the other side of the Mall, over here where the theaters are, where there are pay, public pay phones. We drove up there and I am thinking what am I going to tell the police.

Q. O.K. So that is all you saw with the car and the people, is that correct?

A. Right, that's all I saw.

Q. Now Leanne, this man you call "Mountain Man" that you saw running up and force the door open and then jump in and then hit Ms. Whitlock a few times, is he here today?

A. Yes sir.

Q. And where is he sitting?

A. He is seated right there.

Q. In the white shirt?

A. Right.

[494] MR. ERVIN: Judge I would ask that the record show that the witness identified the defendant in this case.

JUDGE: So ordered.

MR. ERVIN: And you got a good look at these people, is that correct?

A. Yes I did.

MR. ERVIN: Anne this is Mr. Roberts and Mr. Bobbitt. They may have some questions.

MS. STOLZFUS: O.K.

CROSS EXAMINATION

BY MR. BOBBITT:

Q. Ms. Stolzfus when did you go to the police and tell them what you just told us?

A. Well I actually didn't go to the police. They came to me.

Q. When was that?

A. A week and a half after this happened, on a Wednesday I was in a class talking to one of my, talking to some of my classmates and didn't make the association at that time, but was just telling her about this crazy car that I had seen and she called the police and reported my story to the police and the next night, Thursday [495]

night, a detective came to my class at JMU, I'm a full time student there . . .

Q. So you are saying a week and a half after this, you talked to the police about it.

A. That's right.

Q. Had you seen the newspaper reports of a girl being missing in the meantime?

A. No sir I hadn't. I had known . . .

Q. Why, why were you telling the girl at this class about the story?

A. Well we were just talking about, we were talking about Leanne. By that time her body had been found and I'm a full time student, I was there everyday when this happened. The whole campus only talked about Leanne Whitlock. So it wasn't anything unusual . . .

MR. BOBBITT: (INAUDIBLE).

MR. ERVIN: Judge could she be allowed to finish her answer?

JUDGE: Yes and I would ask that you just answer the questions that you are asked.

MS. STOLZFUS: O.K., I'm sorry.

JUDGE: (Inaudible).

MR. BOBBITT: You had seen publicity then about the person who was missing and the body found?

[496] A. No I hadn't.

Q. I don't understand. You said, you were just saying that you knew all of that?

A. Right, just from students discussing it everyday in class.

Q. So you talked to students . . .

A. Right.

Q. About this?

A. Right.

Q. And you knew, knew that an abduction had taken place and that a body had been found?

A. Right.

Q. And that's why you were telling the story to the girl in the class, told what you had seen?

A. Right. But I didn't make the association.

Q. O.K. But she did and then the police came to talk to you.

A. Right.

Q. And did you tell the police the, what you just told us at that time?

A. I told the police exactly what I saw, right.

Q. And then were you interviewed later by a different police?

[497] A. I was interviewed very briefly by the one detective who came to JMU that Thursday evening to my class and he asked me to come to the police station the next morning and I talked to Detective Claytor. And each time I spoke to the police, it was always to Detective Daniel Claytor.

Q. O.K. And since then have you talked to anybody from the Augusta County Sheriff's Department?

A. I talked, I'm sorry.

MR. ERVIN: I'm sorry Judge. I didn't hear the question, I apologize.

MR. BOBBITT: I asked if she talked to anybody from the Augusta County Sheriff's Department? Have you talked to anybody from there?

A. There was a gentlemen who came to my house with Mr. Ervin last week but that is the only time.

Q. So you went, you told Mr. Ervin what had happened, what you observed?

A. Right.

Q. And then did you talk to a newspaper reporter about it.

A. Last week a reporter called me from the Roanoke newspaper.

[498] Q. And you told him what had happened? What you had observed?

A. Briefly.

Q. O.K. So you told several people about it, several times, starting with the girl in the class (inaudible) police officers? This isn't the first time that you have recited what you just talked about?

A. No.

Q. In the meantime, have you seen some of the newspaper articles about the story?

A. I saw only some of the JMU papers about it, that were just laying around campus, that's all.

Q. And you heard the talk that was around campus at the time?

A. Right.

Q. You said that you saw these three people at the Mall, the two men and the woman and that you, the woman was, there was a name that the woman was referred to . . .

A. Right.

Q. What was that name?

A. Donna or Sharon, is my memory.

Q. They are not that similar. Can you explain why you think it was one or the other of [499] those names?

A. Because my memory is that "Mountain Man" was calling her Donna and when I asked her if she was Donna, and my memory is she said well Donna or Sharon.

Q. And where was that that you talked to her? Was that in the record shop?

A. Just outside of that shop, in the main corridor of the Mall.

Q. And then you said that this man that you had seen earlier, when you were outside the Mall, in your car behind the blue car with the girl in it, you said the man came out and banged on a van in front of it? Is that, did I understand that correctly?

A. That was my memory first.

Q. Uh, hum. That he came out, and there were people letting school age kids out . . .

A. Well I thought it was some little mini-bus or something. I don't know what it was.

Q. I just, and the person banged on that van?

A. Right. Well just at the back in anger when he couldn't get a ride. I thought it was he was trying to get a bus ride.

Q. O.K. And then there was a white [500] pick-up and the person talked to the people in the white pick-up truck?

A. I don't think he talked to them. He ran up to them and I don't have any memory that he spoke to them. He just ran up there briefly and then ran back to Leanne's car.

Q. When the blue car went out of the parking lot, changed lanes on 33, excuse me, went west, could you see who was driving at that time?

A. Well it was Leanne and they obviously hadn't changed drivers.

Q. She was driving then?

A. She was driving, right.

Q. When the police came and talked to you about what you had seen, did they show you some photographs at that time?

A. Detective Claytor showed me one set of photographs the first Friday afternoon. I talked to him Friday

morning and he had me come back Friday afternoon, then Monday morning I came back again and he showed me another set of photographs and Wednesday he showed me the third set of photographs.

Q. And did you pick the person out of that group of photographs who you had seen at the Mall?

[501] A. Yes, I was very sure of the two men I was shown. I was shown "Mountain Man" on Friday afternoon and I was one hundred percent sure because of the profile and the distinctive nose. Monday I was confident of the identity of "Shy Guy". The "Blonde Girl", I was a little bit less sure of.

Q. But you eventually picked all three out of the photos you were shown?

A. I pointed to three photographs. I don't know, I never had any response from the police as to whether it was a correct person or not.

Q. I'm asking about you. You picked out three photographs as being the people that you saw?

A. I picked two with absolute certainty and the third with a slight reservation.

Q. Who was present when these photographs were shown to you?

A. Detective Claytor and myself.

Q. And was this at your home or was it at . . .

A. No this was in the police station.

Q. And how many photographs did you look at at a time?

[502] A. I looked at six.

Q. In a group?

A. In a group.

Q. And was anybody else present when you did that?

A. No.

Q. Did, was this over a period, you said something about looking at one group and then picking out the other man later. Was this over a couple of days or was this all at the same time?

A. Well O.K., well Friday morning I spoke with Detective Claytor first. I gave detailed descriptions of the three persons and he said that I should come back after my classes Friday afternoon, that he had some pictures he wanted to show me. He showed me one set of six pictures and simply, in a very professional manner, asked me if I recognized any of these persons?

MR. BOBBITT: O.K.

A. And then Monday morning, I, he gave me another set.

Q. All right. So I see, you were there Friday and then you were there Monday also?

A. Right. But it was a different set of pictures, different persons.

[503] Q. And have you seen those photos since then?

A. No I haven't.

Q. Have you seen photographs in the newspaper or, of Mr. Strickler?

A. No I haven't.

Q. Seen any of the television coverage of Mr. Strickler's arrest?

A. Not of his arrest. I saw T.V. last, coverage last night at eleven o'clock news. That's the only coverage I have seen.

Q. Was there a picture of Mr. Strickler on there?

A. Last night?

Q. Uh, hum.

A. Yes. I very carefully avoided watching the news because this whole incident was very distressing.

Q. O.K. Did your seeing those photographs and seeing the television picture last night, influence your identification of Mr. Strickler today?

A. Absolutely not.

Q. How can you say that?

A. Pardon me?

Q. Why do you say that?

[504] A. I had, first of all, I have an exceptionally good memory. I had very close contact with him and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification.

MR. BOBBITT: May I have just a minute Judge. Ms. Stolzfus do you think you could also identify the other two people that you saw in the Mall?

A. I am confident that I could identify the man I called "Shy Guy". Like I say, I got very close to him and I looked up very close, at close range and apologized and he smiled and I am very confident that I could identify him. I am less confident of the girl, I must admit. I know what she looks like but I have seen at least two girls that look very similar and they both look like her so that becomes confusing.

Q. Do you know the name of the person whose picture you identified?

A. No I don't. I was never told.

Q. The girl I am talking about?

A. No I don't. I have no idea. I don't know the gentlemen's names either.

Q. I want to get back to the, you had [505] some conversation with the woman you said?

A. Right.

Q. Was that when, you had said something about hooking the button in your blouse. Was that when you had the conversation about the name?

A. No that was right after that. She spoke briefly with "Mountain Man" and then turned to go and then he called her again and she turned around while she was walking and just walked right into me.

Q. Did he use a name when he called her?

A. I think at that point he was just yelling. He was really revved up.

Q. And so that wasn't when you asked her if her name was Donna?

A. No, initially when he, he was yelling and calling her name and then I, it looked as if he was looking at her and so I stopped her and said are you Donna, the person he is calling?

Q. Yet to spite that close contact and conversation, you're not as sure about her identification?

A. I saw a girl that I thought was her, I thought I saw a picture of her, but I saw a [506] witness today in that room out there that look like her too and that is very distressing to me. But I can give you detailed description of what she did in fact look like.

Q. What did she look like?

A. Well she was about five-four. She was heavyset. She was large busted. She was wearing blue jeans and a white top exactly like the girl who is a witness, who is sitting out in that room. She had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face. Kind of a wide roundish, square face. She was, O.K., like I say, she was wearing a white top and blue jeans and sneakers. I must say I had no idea I was witnessing an abduction so I wasn't paying that much attention to all of those details and it was January 5th and this was a few months later and I haven't seen the media to, to have any reinforcement of any memory.

MR. BOBBITT: I don't have any other questions.

MR. ERVIN: Judge before (inaudible) I would (inaudible).

JUDGE: (Inaudible).

[507] MR. ERVIN: I would ask that this bag stay with Exhibit Number Seven that has been introduced by the Commonwealth Judge.

JUDGE: The bag stay with it?

MR. ERVIN: Yes sir.

JUDGE: All right.

MR. ERVIN: Thank you Judge. I have no other questions of this witness Judge.

JUDGE: (Inaudible).

MR. ERVIN: Yes sir.

JUDGE: Any more questions for Ms. Stolzfus?

MR. BOBBITT: Not at this time.

JUDGE: All right.

MR. ERVIN: Your Honor may this witness be excused?

MR. BOBBITT: Your Honor we would, we do not want her to be excused at this time.

JUDGE: All right. Ms. Stolzfus you will have to stay with us please. Do not leave the presence of the Court. Thank you.

MR. BOBBITT: Your Honor we have a motion to make outside the presence of the jury (inaudible).

JUDGE: We are going, members of the jury, we don't have you on a starvation jury list. [508] We just want, (inaudible). We are going to stop for lunch now. It is ten minutes after one. Will an hour be time enough for you (inaudible)? Now members of the jury listen to me now. Do not discuss the case with anyone. Do not allow anyone to discuss it with you. Everybody be seated. Do not allow anyone to discuss it with you. If there are any media accounts of this trial, ignore them. If anyone tries to influence you by any, by talking to you or showing something to you or something of that nature, ignore them entirely. When you return, return to the juryroom. Do not return to the Courtroom. You may go on to lunch now. I'm going to ask everybody in the Courtroom to remain seated until the jury is gone. Mr. Bobbitt.

MR. BOBBITT: Your Honor at this time we would like to move to strike the identification of Ms. Stolzfus on the grounds that she was shown pictures which she picked out, identified apparently Mr. Strickler from these pictures and that that identification must have had an effect on her to spite what she says today in Court and that when she was shown those pictures of what amounts to a photo line-up, she said she saw six pictures in a row. She was shown a photo line-up. [509] No attorney for the defendant was permitted to be present or was present at that time. That was over two and a half weeks after the abduction. Mr. Strickler had been arrested at that time. He was represented by an attorney in Harrisonburg at that time and yet his attorney was not given the opportunity and obviously wasn't present to see, to

observe the photo line-up and we would object to it on that grounds.

JUDGE: Mr. Ervin.

MR. ERVIN: May it please the Court. Your Honor first off this witness was shown a photo line-up, not just a single picture and asked if this is the man and not a photo line-up. There has been absolutely no evidence at all brought by the defense to show that this photo line-up was unduly suggestive in anyway. And Judge under Virginia law there is no reason to have the defendant or his attorney present at a photo line-up. Now a line-up with the defendant taking part in it, the defendant would have the right to have an attorney there, but not in a photo line-up. Judge I would refer the Court's attention to (inaudible) v. Commonwealth, decided November 15th, 1988 in the Court of Appeals where the witness was shown just one picture of the [510] defendant and said that's the man and the Court said that was permissible based on the totality of the circumstances the witness still had a good impression of the defendant and allowed that evidence to come in and we just ask that this motion be overruled at this time.

JUDGE: Mr. Bobbitt any further?

MR. BOBBITT: No sir.

JUDGE: Mr. Bobbitt I am going to overrule your motion and I will note your objection to the ruling of the Court.

MR. BOBBITT: Thank you sir.

* * *

[511] MR. ERVIN: Call Kurt Massie.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Kurt Douglas Massie.

Q. And where do you live sir?

A. Right now in Middlebrook, Virginia.

Q. Are you employed?

A. Mastic, in Stuarts Draft.

Q. How long have you been employed?

A. Nine years.

Q. Nine years?

A. Yes sir.

Q. Mr. Massie I direct your attention back to January 5th, 1990, of that evening. Did you work that day?

A. Yes sir.

Q. What time did you get off from work?

A. Seven o'clock.

Q. And where did you go after you got [512] off from work?

A. Well I had to go down and pick up my daughter. I was separated and the only way I could see her and

keep her was to go down and pick her up and take her down to my parents which they live in Grottoes.

Q. O.K. And where were you going to pick her up at?

A. Grottoes.

Q. O.K. Which way did you go?

A. Down 340.

Q. You know why we are here today. Tell the jury what happened.

A. Well we had just, we got off and went straight down. Got down 340, a car was coming up and we had to slow up because one of them kind of come around the car, went to turn off, he didn't give no signal. There was a big commotion there and we kind of slowed up, watched this car turn in. It looked like a bunch of people in it. When it turned in, I seen a guy and a girl, who was setting in the front and another guy in the back. They pulled off the road and just kind of set there a little bit. There is a road going in the woods, instead of taking the road to the woods, they turned and went down along [513] the field so we just pulled over and watched. We thought they were going to get stuck, is what we thought. And they went all the way through the field so once they went down and out of sight, we left.

Q. And you say you all slowed down. Did you see inside the other vehicle?

A. I could see the driver. I was on the passenger side and I could see the driver.

Q. Kurt let me ask you if you recognize this?

A. Yeah right here.

Q. What road is that right through here?

A. It is 340.

Q. O.K. And which road did they turn on, which field did they turn down in?

A. This one right here.

Q. Right in front of the sign?

A. Right in front of the sign. There is another little road right here. They stopped like they were going to go into that one and into the woods but they didn't take that, he turned in and went right straight up along this field.

MR. ERVIN: Judge I offer this as Exhibit Number Eight.

[514] JUDGE: Commonwealth's Exhibit Eight. Any objections?

MR. BOBBITT: No sir.

JUDGE: The photograph will be marked Commonwealth's Exhibit Eight and will be admitted into evidence.

MR. ERVIN: Do you know how many people were in the car at first?

A. To start with, it looked like, it looked like a bunch, looked like at least four. But when they turned off, the cars behind them, we could see in good. It was a guy

and a girl setting up front and another guy setting in the back and he had his arm laid across the seat, just kind of like this. He had (inaudible) girl (inaudible). The driver when he turned, when he went to pull off, he turned and looked right at us. We were just sitting. We had done come to almost a complete stop, sitting and watching.

Q. And did you get a good look at . . .

MR. BOBBITT: Mr. Ervin.

MR. ERVIN: I'm sorry.

Q. Did you get a good look at the driver of this vehicle?

A. Yes sir I did.

Q. What kind of vehicle was it? Could [515] you describe the vehicle?

A. Yes. It was a dirty, it was a dirty looking (inaudible). We thought then that they had been out partying or something, riding around in a field. It was a blue looking car (inaudible). It was really muddy looking. We watched it when he turned off. He just kind of set there. Even the driver himself turned. He acted like he didn't know which way to go. It was, like I said, it was a road right straight in the woods, instead of taking that road, he turned. Turned the car and went around like this.

Q. And you got a good look at the driver?

A. Yes sir.

Q. How far away would you say he was when you . . .

A. Well he was right on just the opposite side of the road. I would say eight to ten feet at the most.

Q. The man that was driving this little blue car when it turned down into this field. Is he here today?

A. Yes sir.

Q. And where is he seated?

A. Right there.

[516] Q. The man in the white shirt?

A. Yes sir.

MR. ERVIN: Judge I would ask the record to show that he identified Mr. Strickler, the defendant.

JUDGE: So ordered.

MR. ERVIN: About what time of night was this?

A. I'd say right around seven-thirty because we never made no stops, we come right on through.

Q. Were you aware of this road through the field?

A. Yes.

Q. And how did you know it was a road through the field?

A. Well I was raised around this area. And on back years ago, I'd say ten or fourteen years ago, we use to go in there and we didn't have nobody to fool with us, we would go in there and drink beer and whatever, and that's how I knew the road was there.

Q. And you say you were afraid they were going to get hung up down there?

A. Yes, that's why we pulled over and stopped and watched. We figured that they were [517] going to get stuck and we was going to go back and help them.

Q. And did you ever see the other man in the car?

A. No he never would turn around. He kept, he was turned to the side the whole time with his arm up on the seat, back seat.

Q. How about the girl, did you ever get a look at her?

A. Never did.

Q. But you can identify the defendant as the driver?

A. He turned and looked right at us.

MR. ERVIN: O.K. This is Mr. Bobbitt and Mr. Roberts. Would you answer their questions please.

CROSS EXAMINATION

BY MR. BOBBITT:

Q. Mr. Massie you said that as you got to this point in the road that, you mentioned we, who was with you in the car at that time?

A. I had another friend of mine that worked with us. We were getting off from work. See I didn't have a license, a driver's license.

* * *

[520] Q. All right. And then the car, the slower car turned into this lane?

A. Yes.

Q. That you knew about?

A. Yes.

Q. So you weren't surprised that it turned then because you knew . . .

A. The way it had done slowed up, I figured they were just going to pull over. They just kind of made a turn and just kind of set there like he didn't know which way to go.

Q. And you say you saw four people in the car?

A. I thought it was until they turned. When they turned, there was cars behind me, there was cars behind me, you could see lights, it wasn't but three people in that car when they turned. But when they were coming down 340, we just almost stopped to let the cars, because the cars went around then. We kind of slowed up and when we did, the car come back in at us and we could see, I could see the car, it looked like a bunch of people in the car is what it looked like until they turned off, actually turned off and the cars behind me, I could see right in the car and [521] it wasn't but three people in the car.

Q. How were you able to see in the car so well, I mean this was after dark, wasn't it?

A. Yes sir. Well the cars, there was lights, cars all behind him and there were two or three other cars behind them.

Q. So the headlights of the other cars . . .

A. Headlights of the other cars and then our headlight off of ours, when he turned, I could see, the only reason I could see him was the headlights off of our vehicle.

Q. Off of your vehicle?

A. He was like this and we were like this.

Q. Uh, hum.

A. That was just the way it was. He was looking right at me. He just turned before, before he made the turn to go over, he didn't know where he was going. He just kind of set there for a little bit. He wasn't going, I'd say three miles an hour before he turned off the road. He acted like he didn't know were he wanted to go. And then once he did turn off, he just set there. So when he did, we eased over.

Q. So at that point he would have been [522] out of your lights, is that right?

A. He was right at, right beside us. We was like this. The guy that I was riding with, he is blind in one eye and you know, he is kind of skeptical of vehicles you know, and he kind of, we slowed way up because we didn't know if anymore cars would come out around them or what was going to happen because this guy hadn't given no signal or nothing. He was almost just kind of setting in the road before he turned off.

Q. So was the fellow that was driving you, could he see . . .

A. He could see . . .

Q. Vehicle also?

A. He could see the cars. He knew exactly, he could identify the car, yes, no problem. But as far as, he was trying to keep his eye on the road and the other traffic coming . . .

Q. So he couldn't see who was in the car?

A. We just ended up pulling over. We just ended up pulling off the road completely and we just set and watched him as he drove through the field, wanted to see if they were going to get stuck or what.

Q. And you couldn't see who was in the [523] car at that point, could you?

A. I seen it when they first come up . . .

Q. I understand, but I am talking about after they . . .

A. After they turned off, no. After they started through the field no, it was no way.

Q. Now was the girl in the front seat, was she a white girl or a black girl?

A. White girl.

Q. White girl?

A. Yes.

Q. And the fellow in the back seat, was he white or black?

A. White.

Q. And you could tell that from . . .

A. Yes. I could tell that as, before they turned off but I never could see their faces, his face was the only one that I could see.

Q. Do you know Mr. Strickler?

A. No sir I don't.

Q. He is not somebody you knew before . . .

A. No sir.

* * *

[529] MR. ERVIN: Thank you. Call Carolyn Brown.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your name please?

A. Carolyn Brown.

Q. O.K. Now Ms. Brown direct your attention back to the night of January the 5th, 1990, do you remember where you were that night?

A. In at Dice's.

Q. You were at Dice's Inn?

A. Uh, hum.

Q. And where is that located?

A. In Staunton, I couldn't tell you.

Q. Who all were you with that night Ms. Brown?

A. Debbie Sievers and Nancy.

Q. Ms. Brown do you know why we are here today?

A. Uh, hum.

Q. Did anybody come into Dice's that night that attracted your attention?

[530] A. No . . .

Q. Just tell the jury what happened, what happened that night Carolyn?

A. Well not really. Just, I don't know.

Q. O.K., let me ask you this. Did you talk to the police about this case?

A. Well one from Harrisonburg, yeah.

Q. Tell us about these two men that you saw at Dice's Inn. About what time did they arrive?

A. Between, it was between nine and nine fifteen when I seen them.

Q. And was anybody with them when they came to Dice's?

A. No.

Q. Did you ever get to talk to the two men at Dice's?

A. Just very little, but not very much, very little.

Q. Which one did you talk to?

A. Well mainly Ron.

Q. O.K. Do you know Ron's last name?

A. No I don't.

Q. How about the other man, do you know the other man's name?

[531] A. I only knowed him by Stoney, but that's it.

Q. O.K. This man Stoney, when he came in, how was he dressed?

A. Well I didn't pay all that much attention to him but he was dressed right nice I thought.

Q. What kind of pants did he have on?

A. Well they were blue but I don't know what, really what kind of material it was.

Q. Were they clean or dirty?

A. Well a little bit dirty.

Q. O.K. What do you mean dirty, little bit dirty? What do you mean?

A. Well like they had been wore a couple days or so.

Q. The man that you call Stoney, is he here today?

A. Yes he is.

Q. Where is he seated?

A. Settin' right over there.

Q. In between these two . . .

A. Right between these two men?

MR. ERVIN: O.K. Judge I would ask that the record show the witness identified the defendant.

[532] JUDGE: So ordered.

Q. How long did you stay at Dice's that night Carolyn?

A. Stayed there until one.

Q. O.K. How about these two men? How long did they stay?

A. Well they were there when we left. We left there at one.

Q. O.K. So they did not leave before you?

A. No.

Q. Did you ever see Stoney here get with anybody else that night?

A. Well some girl, I don't know who it was. Her name was Donna, I think it was . . .

Q. O.K.

A. That's all.

Q. Was she there before or after they got there?

A. She was there before.

Q. She was already there?

A. Uh, hum.

Q. About what time had she gotten there?

A. Around eight.

Q. Did you see the vehicle that these [533] men were in?

A. Yes I did.

Q. O.K. How did you happen to see that?

A. Well when we was going out and I was standing out there beside the door and I happened to see them ride by and they was, I reckon, they was hunting for us because, they wanted to follow us (inaudible), I don't know, that was the only time I seen them is when they rode by the building and I seen them sitting in it.

Q. Carolyn let me show you Exhibits Four and Five, photographs of a vehicle.

A. O.K.

Q. Do you recognize that vehicle?

A. Uh, hum, that's it.

Q. And who was driving the vehicle when it went by?

A. Well at the time it was Stoney driving.

Q. Now Stoney, you mean this man here?

A. Uh, hum.

Q. Did anybody leave with him when they left?

A. Donna.

Q. Donna did?

[534] A. Uh, hum.

MR. ERVIN: Carolyn this is Mr. Bobbitt, he may have some questions for you.

MR. BOBBITT: No questions.

MR. ERVIN: Thank you Carolyn. Your Honor may this witness be excused?

MR. BOBBITT: No objections.

JUDGE: Yes.

MR. ERVIN: Thank you.

MS. BROWN: Uh, hum.

MR. ERVIN: Call Debra Sievers.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Debra Lynn Sievers.

Q. O.K., Ms. Sievers, do you know Carolyn Brown that just testified?

A. Yes I do.

Q. Direct your attention back to January 5th of 1990, where were you all that night?

A. Dice's Inn.

* * *

[536] Q. How was Stoney dressed that night?

A. He had on a tank top that was low cut under the arms and he had on, looked like jeans, but they wasn't jeans, they was jean material and boots.

Q. Did you notice anything about his jeans in particular?

A. No.

Q. Were they clean or dirty?

A. They were a little dirty.

Q. Little dirty?

A. Uh, hum.

Q. O.K. And you say he had a tank top that was cut low under the arms?

A. Uh, hum.

Q. How about this shirt, do you recognize this?

A. No.

Q. This is not the one he had on then?

A. No audible answer.

Q. After you saw them that night, how long were you all there?

A. Well we got there at seven and we left around two.

* * *

[539] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your name please?

A. Nancy Simmons.

Q. Nancy do you know Carolyn and Debra that just testified?

A. Yes sir.

Q. Going back to the night of January 5th, 1990, were you with them that night?

A. Yes sir.

Q. Where were you all?

A. At Dice's Inn.

Q. And about what time did you all get there?

A. Probably about seven.

Q. Later that night did you dance with a man quite a bit?

A. Yes, two of them.

Q. Two of them. Did these two men come in together?

A. Uh, hum.

Q. The two men that came in together, do you know their names?

[540] A. Stoney and Ron.

Q. Stoney, is he here today?

A. Yes, Tommy . . .

Q. Right here?

A. He wouldn't tell us Tommy, he said Stoney.

MR. ERVIN: Judge I would ask that the record show that she identified the defendant.

JUDGE: So ordered.

MR. ERVIN: About what time did they get there?

A. I think it was around nine or a little after.

Q. And how long did they stay there Nancy?

A. Until it was over, about twelve-thirty or one.

Q. Did they leave before or after you did?

A. About the same time.

Q. Did anybody leave with them when they left?

A. Yes.

Q. Who left with them?

A. Donna Kay.

Q. Was Donna Kay there before they [541] arrived?

A. Yes, we saw her.

Q. The other man that you called Ron, did he tell you his last name?

A. No.

Q. Did you dance with him?

A. Yes.

Q. During the night while you were dancing with Ron, did he give you something?

A. Yes.

Q. What did he give you?

A. A watch.

Q. Let me show you Exhibit Number Three and ask you if you recognize that watch?

A. Yes.

Q. And where have you seen this watch before? Is this the one that he gave you?

A. Yes.

MR. ERVIN: Judge at this time we would ask to introduce Exhibit Number Three into evidence.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objection.

JUDGE: The watch which has previously been identified for identification for Commonwealth's Exhibit Three will be admitted [.]

* * *

[548] MR. ERVIN: Call Mark Wood. Come up and have a seat Mr. Wood.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Mark William Wood.

Q. Do you know the defendant, Tommy Strickler?

A. Yes sir.

Q. Are you related to him?

A. I'm his second cousin.

Q. Mr. Wood I direct your attention back to January 11th, 1990, 10th or 11th of 1990, did you see Mr. Strickler one of those days?

A. Yes sir.

Q. And when did you see him?

A. He walked up to my house and told me [549] his car wouldn't start.

Q. And what did you do?

A. I walked down the road and pushed it out of the road and tried to get it started and I couldn't get it started.

Q. Do you remember what type of car it was?

A. I think it was a blue Mercury Lynx.

Q. O.K. Let me show you Exhibit Four and Five and ask you if you recognize the car in those photographs?

A. Yeah, that's it.

Q. Is that the car Mr. Strickler had?

A. Yes sir.

Q. Did he tell you where he got this car from?

A. He said it was a friend or his girlfriend's, I don't quite remember.

Q. O.K. A friend or a girlfriend's?

A. Or a girlfriend, one of the two.

Q. And where did you all push it to?

A. Right down the road into a church parking lot.

Q. Is this a photograph of the church you all pushed the car to?

A. Yes sir.

* * *

[558] MR. ERVIN: Call Dan Holsinger.

CLERK: Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. HOLSINGER: I do.

CLERK: Mr. Holsinger please go across and take the witness stand.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Please state your full name please.

A. Daniel (Inaudible) Holsinger.

Q. And what area do you live in Mr. Holsinger?

[559] A. North of Waynesboro on 340.

Q. And what is your occupation?

A. I'm a Dairy Farmer.

Q. Mr. Holsinger I direct your attention back to January 11, 1990. Do you remember what you were doing that day?

A. Not sure about it. Is that on a Saturday, was it? I thought it was on the 13th.

Q. O.K. I'm sorry, 13th. I need to get my dates straight.

A. O.K.

Q. January 13th, what were you doing that day?

A. We were in the process of harvesting, picking a little corn in a field owned by someone else.

Q. O.K. Let me show Exhibit Number Eight and ask you if you recognize that scene?

A. Yes, uh, hum.

Q. And is, which field were you working?

A. This little patch right in here. It is about a ten acre stretch right there.

Q. O.K. Was anybody with you over there?

A. Had my two sons with me, one at one [560] time and then the other one came later.

Q. While you all were out there working, did you all find anything in the field?

A. Not anything down in here, no, not at all.

Q. O.K. How about any place else?

A. Well when you came in, that was early in the afternoon, I noticed a hat laying right up in this area right up here. I was in a hurry so I didn't bother with it, I went on in. And then a little later on when we came back with the machinery to start picking corn, my son was with me and he seen the hat too, and I said well pick it up and see what it looks like, looks like a right nice hat. So that was kind of what started the ball rolling, you might say.

Q. O.K. Did he pick the hat up?

A. Yes he picked the hat up and then he, and then somewhere right there close he picked a wallet, or some kind of a billfold or something up.

Q. O.K. And did he pick anything else up at that time?

A. Not at that particular time, no.

Q. The billfold, what happened to the billfold?

[561] A. Well we, he brought the hat and billfold and I opened it and looked at it and I just went on. And we went on about our work and we worked for a couple of hours there, had problems, so we went back to the

house and had to get another tractor and as we got back to the house, we laid it, it was wet, of course it was frozen and everything else. And we laid the wallet under the stove, wood stove there just to kind of dry out some, and we let it lay there and actually we didn't bother it any until we came back that night and was eating supper again.

Q. Did you examine the billfold at that time?

A. Yeah, we took it apart and kind of looked at it, trying to decide, it looked like somebody had just left it, it wasn't any big deal at all and we weren't really concerned about it.

Q. Was there any identification papers in there identifying who the owner was?

A. Yes, uh, hum.

Q. And who was the owner of the billfold.

A. Well it had Ronald, I think Ronald Lee Henderson, I think it was.

Q. Ronald Lee Henderson?

[562] A. I believe it was Lee, I know Ronald Henderson.

Q. Did you all find anything else in that field that day?

A. Right off, no, when I was coming back out, I noticed some type of garment laying on the ground and I was concerned about that. I went on my way and I just looked at it as I went by.

Q. Just left it laying there?

A. Right, uh, hum.

Q. And this billfold, did you turn the billfold over to the police?

A. Yes we, what happened there is we were getting ready to go out later that evening about six o'clock, the news came on and then that was when they showed Henderson's photograph on television and so we, my wife said well that's the guy in the wallet. And so that started things rolling there.

MR. ERVIN: O.K. This is Mr. Bobbitt over here, would you answer his questions please?

MR. HOLSINGER: All right.

MR. BOBBITT: No questions.

MR. ERVIN: Thank you Mr. Holsinger.

* * *

[563] MR. ERVIN: . . . Call Donna Kay Tudor.

CLERK: Would you raise your right hand please? Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MS. TUDOR: I do.

CLERK: Please take the witness stand.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Donna Kay Maddox Tudor.

Q. And how old are you?

A. Twenty-six.

Q. Ms. Tudor I direct your attention back to January 5th of 1990, do you remember where you were that evening?

A. I was at Dice's.

Q. Before you went to Dice's, do you know where all you went?

[564] A. I went to Vames and then I went to Boyd's and got my hair fixed.

Q. O.K., and what time did you get to Dice's?

A. Along about eight.

Q. And how long did you stay at Dice's?

A. Until it closes.

Q. Did you leave with anybody when you left?

A. I left with Tommy Strickler and a guy named Rebel.

Q. Tommy Strickler, is he here today?

A. Yes.

Q. Where is he seated?

A. Right there.

Q. In the white shirt?

A. Yes sir.

MR. ERVIN: Judge I would ask the record to show that she has identified the defendant?

JUDGE: So ordered.

Q. What type of car did you all leave in?

A. In a little Lynx, Blue Lynx.

Q. Let me show you Exhibits Four and Five and ask you if you recognize those?

A. Yes that's the car we left in.

[565] Q. What was Mr. Strickler wearing that night?

A. A black (inaudible) shirt and a pair faded jeans and a belt with a girl design on it.

Q. You don't know what kind of shoes he was wearing?

A. Reeboks.

Q. Let me show you this shirt. Do you recognize this shirt?

A. Yes it was the shirt he was wearing.

Q. You sure?

A. Yeah I am positive.

Q. After you all left Dice's, where all did you go?

A. We took Rebel to check on some pot.

Q. And where was that at?

A. Harrisonburg.

Q. And what happened with Rebel when you were checking for pot?

A. Well two places they didn't have none, but the third place he come out with some.

Q. And what happened then?

A. He took and give Thomas seventy-five dollars to keep for him.

Q. And then what did Rebel do?

A. He was driving the car then.

[566] Q. While Rebel and Mr. Strickler were in the car, who all was in the car?

A. Just me, Tommy and Rebel.

Q. And were you in the front seat or the back seat?

A. Back seat.

Q. And did you hear what they were talking about in the front seat?

A. Tommy was setting back there with me.

Q. O.K. I'm sorry. What were they talking about?

A. They were talking about "it".

Q. About what?

A. "It".

Q. What were they saying about "it"?

A. They said they got in a fight with "it".

Q. Got in a fight with "it"?

A. Uh, hum.

Q. Well did they say anything else about "it" at that time?

A. They called it a name I would rather not say.

Q. You've got to say it, what did they call "it"?

[567] A. They said nigger.

Q. They said nigger. They called "it" a nigger?

A. Uh, hum.

Q. What happened then, did they say anything else about "it"?

A. They just said that they got in a fight and kicked "it" in side of the head.

Q. Who said that?

A. Tommy and Rebel.

Q. What was their attitude while they were talking?

A. Tommy was kind of calm but Rebel was kind of nervous, he kept looking over his shoulder.

Q. You said kicked "it" where? Who said they kicked "it"?

A. Tommy and Rebel.

Q. Mr. Strickler here and Rebel too?

A. Uh, hum.

Q. Did Tommy say where he kicked "it" at?

A. Back of the head.

Q. Back of the head. Did he say why he did that?

A. No he didn't.

[568] Q. Did they say what happened to "it"?

A. He said something about a crusher.

Q. Do you know what type of crusher they used?

A. Rock crusher.

Q. Rock crusher. Is that what they said?

A. No audible answer.

Q. How long was Mr. Henderson with you all that night, or Rebel, I'm sorry, how long was Rebel with you?

A. Not very long because he, when he was driving he just about hit a car head-on and Tommy got mad at him.

Q. What happened when Tommy got mad?

A. He pulled a knife out and told Rebel he'd take and, that he would stab him if he didn't cool it.

Q. What did Rebel say?

A. Calmed down.

Q. What happened to Rebel after that?

A. We took him to a house not far from his complex and let him off.

Q. Where did you and Mr. Strickler go then?

A. We went up to a motel at Blue Ridge.

[569] Q. And how long did you all stay in a motel?

A. Overnight.

Q. And where did you all go the next day?

A. We went to, went to Wintergreen.

Q. And do you know who he went to see up there?

A. Lynn.

Q. Lynn?

A. Lilly or whatever.

Q. And after that, where did you all go?

A. Went, we went to Vames, well we stayed in the woods that night and went to Vames the next day.

Q. And after that what did you all do?

A. We went to my stepfather's and got some of my clothes.

Q. And then what did you do?

A. Went to Virginia Beach.

Q. Why did you all go down to Virginia Beach?

A. I went down to see if I could get a divorce.

Q. And how long did you all stay in [570] Virginia Beach?

A. Almost a week or something.

Q. And when you came back, do you remember what day you all came back on?

A. On a Wednesday.

Q. Where did you all go when you came back?

A. We went to his friend, Mark.

Q. Where did you all go after that?

A. Went back, went to, went back to Lynn, he got stalled.

Q. The pants that Mr. Strickler was wearing the night that he met you at Dice's, what happened to those?

A. His mom washed them.

Q. Washed them? Were they dirty?

A. Yeah. Had some blood on there and a little burn place.

Q. Some blood and a little burn place. And how about the shirt, do you know what he did with the shirt?

A. He took it off and washed it.

Q. Do you know what happened to it after he took it off, did you ever see it again?

A. He put it in the dryer at his mom's.

Q. Donna did you see Mr. Strickler's [571] hands that night?

A. Yeah, he had a place on his knuckle.

Q. What kind of place on his knuckle?

A. Looked like he had been fighting.

Q. Did you ask him about it?

A. Yeah, he said he was in a fight.

Q. In a fight. Did you know Leanne Whitlock?

A. No.

Q. Did you ever see anything in the car about Leanne Whitlock?

A. Yeah, I seen a driver's license and I.D.

Q. Where were those?

A. In the glove compartment.

Q. Driver's license and I.D., was there anything else in the glove compartment?

A. Yeah, it was a bank card.

Q. A bank card. Whose name was that in?

A. Leanne.

Q. And what did you all do with the bank card?

A. Well Tommy, he left it in there, when we were in Virginia Beach he tried to get some money out but . . .

[572] Q. He tried to get some money out? Did Tommy Strickler tell you where he got this car from?

A. No he said he bought it from some man.

Q. Did he tell you how much he paid for it?

A. Five hundred.

Q. Donna let me show you Exhibit Number Two, a pair of pearl earrings. Do you recognize these?

A. Yes they are the ones that Tommy give me.

Q. Who gave them to you?

A. Tommy.

Q. Is that the defendant?

A. Yes.

Q. When did he give these to you?

A. In Virginia Beach.

Q. And you were finally arrested up here, is that right?

A. Yes.

Q. And after you were arrested, what did you do with the earrings?

A. Give them to the police.

* * *

[574] Q. In the oil. After the car broke down, where did the car break down, where did you all leave it?

A. At a church.

Q. Did you go some place after the car broke down?

A. Yeah, we went to his mom's.

Q. And who took you up there?

A. Mark.

Q. Mark did? And were you eventually arrested?

A. Yes.

Q. And what were you charged with?

A. Grand Larceny.

Q. Is that charge still pending against you?

A. Yeah.

Q. And where is that at, that charge?

A. In Harrisonburg.

Q. In Harrisonburg. Was that for this car (inaudible)?

A. Yeah. Because I was seen in it.

Q. Was there any damage done to the car?

A. Yeah, Tommy, me and him got in an [575] argument about something and I did it.

Q. You are going to have to speak up now, (inaudible).

A. We and him got into a little disagreement about something and I didn't understand him.

Q. So what did he do?

A. He took his knife out of the dashboard.

Q. Where did he carry his knife at?

A. At his, on his side in a leather case.

Q. What type if knife was it? How long was it?

A. It was a hunting knife, about like this.

Q. And you say he cut the car up some?

A. Yes.

Q. When you all abandoned the car, were there any footprints or anything on top of the car?

A. Yeah, where Tommy got on it jumping around.

Q. Let me show you these and ask you if you recognize those pictures?

A. (Inaudible).

[576] Q. Whose footprints were those on the car?

A. Tommy's.

Q. Tommy's. Why was he jumping on the car?

A. It got stuck in the mud.

Q. Where was this at?

A. Up somewhere in Wintergreen in a mountain area.

Q. Did he ever tell you why he kicked "it" in the head like that?

A. So "it" wouldn't give him no more trouble.

Q. So "it" wouldn't give him anymore trouble?

A. So "it" wouldn't give them anymore trouble.

Q. Give them anymore trouble. Did he tell you what type of trouble he was talking about?

A. No he didn't.

MR. ERVIN: Donna Kay this is Mr. Bobbitt over here, O.K., he will want to ask you some questions also, O.K.?

[577] CROSS EXAMINATION

BY MR. BOBBITT:

Q. Ms. Tudor are you presently being held in jail?

A. Yes.

Q. What is the reason for that?

A. Because somebody told some lies on me. Said I was going to run and I ain't.

Q. Said you weren't going to come to trial to testify?

A. I was coming.

Q. But that is why you are in jail now?

A. Yeah.

Q. When you were arrested in Harrisonburg, did the police talk to you then about testifying against Tommy Strickler?

A. Yes.

Q. And did you agree to testify against him?

A. Yes.

Q. And did you tell them at that time what you would say?

A. Excuse me?

Q. Did you tell them what you would say if they put you on the stand?

[578] A. No.

Q. You didn't tell them? Did they tell you what they would do for you if you testified against Tommy?

A. They would help me get out of the charge.

Q. Excuse me?

A. Help me get out of the charge that is pending on me.

Q. The Larceny charge?

A. No audible answer.

Q. You said that you went to Dice's Inn at about eight o'clock?

A. Uh, hum.

Q. Where were you before that?

A. I went to Boyd's to get my hair fixed, then before Boyd's, I went to Vames', sitting there talking to a friend of mine.

Q. What time did you go to Vames'?

A. Probably seven, seven-thirty.

Q. When?

A. Sometime around seven or something like that, right after they opened.

Q. And then you went to Boyd's after that?

A. Yeah I got my hair fixed because it

* * *

[580] Q. And then when you left Dice's that night, you left with Tommy Strickler and Henderson?

A. Yes.

Q. Had you ever met Mr. Strickler before?

A. One time at White's when I was about sixteen but he didn't say very much to me. I had an outfit on he liked.

Q. You lost me in the last part of that.

A. Up at White's. A bunch of them together. I had on an outfit, a leather outfit.

Q. That was a lot earlier?

A. Yeah when I was about sixteen.

Q. Uh, hum. And you are twenty-six now?

A. No audible answer.

Q. Did you say yes?

A. Yes.

Q. So this is the first time that you had met him for a long time?

A. Yes.

A. And so, you left and you all went to, so that Henderson could find out about some [581] pot?

A. Yes.

Q. And you ended up leaving Henderson at one of, one of the places where . . .

A. Apartment complex.

Q. Uh, hum. Where we went there to check on some pot?

A. Yes.

Q. So you all left him there and you all went to the motel?

A. Tommy was mad at him, the way he acted earlier that day.

Q. I'm sorry, I didn't understand.

A. Tommy was mad at him because the way, because he scared me and I started crying because he about hit a truck, head-on collision.

Q. So that is why you decided to leave him there?

A. Uh, hum.

Q. And you say that they were talking back and forth, Tommy was in the back seat with you and they were talking back and forth . . .

A. Yes.

Q. While you were sitting there?

A. Yes.

Q. Do you remember talking to Mr. Ashby [582] and telling him that Tommy never said anything to you about, anything about another girl or about anything happening to another girl?

A. I don't remember.

Q. You don't remember talking to Mr. Ashby?

A. Not completely.

Q. Pardon me?

A. Not completely.

Q. (Inaudible).

A. (Inaudible) and you forget it.

Q. Well first off, do you remember talking to Mr. Ashby?

A. Yeah I talked to somebody.

Q. Out at, out at Crawford Manor?

A. Crawford Manor? That's where I am living at.

Q. O.K. Well did he come out there and talk to you?

A. Yes.

Q. And do you remember telling him that the only statements that you ever heard Tommy Strickler make were things that he said in his sleep?

A. Yes.

Q. That's what you told him?

[583] A. Well I could hear that, him and Rebel was talking but I couldn't hear to [sic] plainly, because they were whispering.

Q. You couldn't hear because they were whispering?

A. They were joking and . . .

Q. You couldn't hear because they were whispering?

A. Yeah because they were making jokes and stuff between them.

Q. But you say Tommy was sitting in the back seat with you?

A. Yes. He was leaned up talking to Rebel.

Q. He was leaning forward. So you couldn't hear to [sic] plainly what they were saying?

A. No.

Q. And when you got, when you came back from Virginia Beach, you got stuck in the mud over at Nelson County?

A. Yes.

Q. Did you all stop at some friends of Tommy's?

A. Yeah we stopped at Lilly's.

Q. At Lilly's. Were those some people that Tommy had previously lived with?

[584] A. Uh, hum.

Q. That's where the car got stuck in the mud?

A. Yes.

MR. BOBBITT: No other questions.

REDIRECT EXAMINATION

BY MR. ERVIN:

Q. Donna Kay all the times that you talked to him, did he ever tell you that "it" was a girl that he had done that night?

A. No he didn't.

Q. He just referred to "it" as "it", or a nigger, is that what he said?

A. Yeah.

Q. And you say he told you he kicked "it" in the head. Did he tell you how he knew to kick "it" in the head?

A. He said he knew karate.

Q. He said he knew karate. And did he tell you why he kicked "it" in the head?

A. He said because "it" would give him no more trouble.

MR. ERVIN: Judge I would offer these two pictures that she identified as Exhibits, [.]

• • •

[589] MR. ERVIN: Call Dr. David Oxley.

DIRECT EXAMINATION

BY MR. MOORE:

Q. Will you tell us your full name?

A. I am Dr. David W. Oxley.

Q. And Dr. Oxley what is your professional field and your present position?

A. I am a Forensic Pathologist and I am Deputy Chief Medical Examiner for Western Virginia.

• • •

[601] Q. All right, O.K., go ahead.

A. There were abrasions, that is scrapes, underneath the chin. There was also some post-mortem slippage of the skin, that whitish area of skin that you showed, that you saw in the photograph that was post-mortem.

Q. You say slippage of the skin?

A. I'm sorry.

Q. You say slippage of the skin?

A. (Inaudible) of the skin, that whitish area that you saw in the Polaroid. But there was also an abrasion beneath the chin, that is a scrape, of the skin that either, that occurred probably during life or very close to the time of death.

Q. O.K.

A. Moving down to the body, on the upper body, the chest, breast, arms, there were long linear scratches over the upper part of the body, over the underside of the arms, on the sides of the arms near the shoulder and on the forearms.

Q. Have you seen such linear scratches?

A. Yes these are patterns, what are called pattern abrasions. Now the body at one point was dragged by the feet on its face, while [602] the body was on its face. These are drag marks. There were three small abrasions on the upper back that were superficial. There was a small abrasion on the right upper thigh and there were bruises of the upper thigh, upper inner thighs, just at the

anal area, crotch area. These were the external wounds present on the body.

MR. MOORE: All right. And at that point then, what did you do in terms of the autopsy?

A. These wounds were diagramed [sic], body diagrams were made and the wounds were photographed, following which the body was opened, organs and organ systems examined.

Q. All right. And did you notice anything remarkable that was not originally apparent from observation?

A. I beg your pardon?

Q. Did you notice anything remarkable from the autopsy that was not originally apparent from your observation?

A. The internal organs were normal. In the heart, in the fat around the heart, there were ice crystals indicating that the body at one time had been frozen. The stomach contained a large quantity of relatively undigested material.

[603] Q. Did you recognize any of that?

A. Oh yes, it was typical fast food. French fries and ground meat, fragments of pickle and fragments of yellow material that resembled cheese.

MR. MOORE: All right.

A. The internal genitalia, that is the uterus, cervix, tubes and ovary were normal. There was no evidence of intrauterine pregnancy. When the skull was opened, the skull fractures that I described previously were again

noted. There were indriven fragments of bone in the brain substance and many large lacerations of the brain itself with hemorrhage into the brain tissues. There were no other fractures, no long bone fractures or other bone injuries.

Q. Did you from your initial observation or the autopsy determine the cause of death?

A. Yes sir.

Q. And what was that?

A. Death was due to multiple blunt force injuries to the head with depressed skull fractures and lacerations of the brain.

Q. Now if you could, in lay terms, when somebody's death is caused by fractured skull and [604] lacerations to the brain, what actually causes them to die? What happens?

A. Well it depends on how severe the brain injury is. A immediate reaction of the brain to injury is swelling. And in people who survive for a period of time, it is this swelling of the brain that usually causes death. In a situation such as this where there are depressed fractures, multiple lacerations and extensive disruption of the brain tissue itself is caused by the injury, insult to the brain tissue.

Q. I am going to ask you to look at this rock.

A. You are not going to hand it to me, are you?

Q. No. I am not going to hand it to you. O.K. (Inaudible) Commonwealth Exhibit Thirteen, from the

injuries you saw to the head, you described a blunt force injury, could they have been caused by an object such as that?

A. Yes they could.

Q. All right. By either dropping it or forcibly throwing it?

A. Yes sir.

Q. If an object like that was the cause of the skull fracture which resulted in death, [605] would that be instantaneously?

A. With these fractures, death is rarely instantaneous. With these fractures, unconsciousness would be virtually instantaneous. Death might take a little bit longer, the heart might beat for a little while, respiration might go on for a little while. Not long, these are severe nonsurvivable brain injuries. But the center for respiration and for the heart that control cardiac action are in the brain stem, lower down on the brain stem. For unconscious, virtually immediately, death, very quickly.

Q. Matter of minutes?

A. Yes sir.

Q. Now is it also part of your training and duties in looking at a body that has been wounded or that has died from the wounds, to determine not only what caused death but how many assaults or woundings would be required, at a minimum, to cause the injuries that you see?

A. That caused the wounds here?

Q. Yes.

A. Three at a minimum. Perhaps more.

Q. But that's part of your job also to try to determine that?

A. To try to separate the injuries and [606] the number of, in blunt force injuries, number of blows or impact.

Q. All right. So in other, just for the jury's benefit, if you had a person who had died with gunshot wounds and you saw various wounds or holes in the body, in the head or arms or legs, you would try to determine how many bullets at a minimum caused those injuries?

A. Yes sir.

Q. And in this particular case, do you also try to determine not only how many blows or wounds caused the injuries but which ones caused death as opposed to certain other wounds that may not have caused death?

A. Where possible, yes.

Q. In this particular case, can you tell us anything about the four skull fractures in three different locations, whether any or all of those would have been lethal or fatal in and of themselves?

A. Any of those wounds, in and of themselves, exclusive of the others could have been potentially lethal.

Q. Can you give an opinion from your experience of whether any two of them together would have caused death?

[607] A. In my opinion, any two of them would have, yeah. They are all depressed and they all caused severe lacerations to the brain.

Q. I take that you cannot give an opinion as to in what order the wounds were inflicted?

A. No sir I can't.

Q. No basis in medical evidence in this case (inaudible)? With regard to the time of death, can you, could you draw any conclusions from the matter found in Ms. Whitlock's stomach?

A. From her stomach content, death occurred at an absolute maximum, six hours after she ate last and probably much less than that.

Q. All right.

A. The food in her stomach was very early, in a very early stages of digestion, the material was easily recognizable.

Q. Could it have been as short as an hour or two?

A. It could have been. It was a lot of it, very little of it had passed into the small bowel.

* * *

[611] Q. . . . Did you notice any injury or damage to the vaginal area?

A. No sir.

Q. From your experience as a forensic pathologist, does the absence of injury in the vaginal area determine or conclude that there was no sexual intercourse?

A. In an adult sexually active woman, no it doesn't. The absence does not necessarily mean that sexual intercourse did not occur.

Q. All right. And you mentioned an abrasion along one side of the neck, I believe, or both sides?

A. Yes sir, under the chin.

Q. All right. O.K., did anything that you saw under there, could that have been caused by a kick possibly?

A. Could have been, it was nonspecific and there was no injury to the underlying structures of the neck to indicate the nature of this, of this abrasion.

* * *

[614] MR. MOORE: I don't have any further questions. Mr. Bobbitt or Mr. Roberts may have some questions.

CROSS EXAMINATION

BY MR. BOBBITT:

Q. Dr. Oxley you mentioned the abrasions under the chin, would they have been consistent with choking?

A. Probably not with the hands, no because they would not, they were not fingernail marks the type you see with manual strangulation. Choking with a rope, with some foreign object [615] could be, yes.

Q. I believe you classified them as nonspecific?

A. Sir.

Q. You classified them, I believe, as nonspecific?

A. Yes sir.

MR. BOBBITT: I don't have any other questions.

MR. MOORE: Nothing further.

* * *

[654] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Carter would you state your full name please?

A. Carter R. Ritchie.

Q. And your occupation?

A. Detective with the Rockingham County Sheriff's Department.

Q. And did you also get involved in this investigation?

A. Yes sir I did.

Q. Direct your attention back to, I believe January 11, 1990, did you have a, the opportunity to respond to a, the location of a certain vehicle?

A. Yes I did.

Q. And where was that at?

A. At the Rockingham County Garage located in Pleasant Valley.

* * *

[657] Q. All the fingerprints that, latent fingerprints that you recovered, you turned those over to Detective McDorman?

A. Yes sir, they were turned over, (inaudible) evidence from the vehicle was turned over to him at approximately ten-thirty that evening.

Q. Investigator Ritchie do you recognize this jacket?

A. Yes I do.

Q. And where have you seen this jacket before?

A. This jacket was removed from the crawl or hatchback portion of the vehicle which Detective McDorman and I processed at the county garage.

Q. And this came from this blue vehicle shown in the picture?

A. Yes it did.

Q. Was there any identification papers in this jacket?

A. Yes there was.

Q. And whose identification papers were they?

A. They were identification papers which belong to Mr. Henderson.

[658] Q. And what did you do with this jacket after it was located?

A. The jacket was picked up and placed into a bag by Detective McDorman and I assisted him in putting it in the bag.

MR. ERVIN: Judge we would offer this as the next Commonwealth's Exhibit?

JUDGE: Any objections?

MR. BOBBITT: No objections.

JUDGE: Gentlemen the jacket will be marked Commonwealth's Exhibit Thirty and will be admitted into evidence. Mr. Ervin?

MR. ERVIN: Yes sir.

JUDGE: (Inaudible) down there please.

MR. ERVIN: Yes sir. Also Detective Ritchie at some point have you obtained the fingerprints of Mr. Ronald Henderson before?

A. Yes I did.

Q. And were those provided to the Harrisonburg Police Department to be sent to the state laboratory?

A. Yes sir they were.

MR. ERVIN: Answer Mr. Bobbitt's questions please.

MR. BOBBITT: No questions.

JUDGE: Thank you Mr. Ritchie.

[659] MR. ERVIN: Thank you, appreciate it. Call Detective Farley, Farley.

* * *

CLERK: Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

DETECTIVE FARLEY: I do.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Please state your full name please.

A. Donald William Farley.

Q. And your occupation?

A. I am with the Harrisonburg Police Department.

Q. And are you one of the investigators in this case?

A. I am.

Q. Officer Farley, direct your attention back to I believe it is January 12, 1990, did you have the opportunity to go to the [660] home of Mr. Strickler's mother?

A. Yes I did.

JUDGE: What day was that?

MR. ERVIN: January 12, 1990.

JUDGE: All right.

MR. ERVIN: And where is this located?

A. This is in Shenandoah County.

Q. And who all was present when you went out there?

A. There was Captain Fairweather with the Harrisonburg Police Department and also Detective Claytor,

Hoover, McDorman and myself. There were two deputies from the Shenandoah County Sheriff's Department which were Deputy Koontz and Deputy Anderson.

Q. And for what purpose did you all go out there?

A. We had obtained a search warrant for the property of Mr. Ed Silvious.

Q. Let me show you this pair of blue jeans and ask you if you recognize these?

A. Yes I obtained these from Mr. Strickler's bedroom.

* * *

[667] MR. ERVIN: Call Detective McDorman.

CLERK: Raise your right hand please. Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

DETECTIVE MCDORMAN: I do.

CLERK: Please take the stand sir.

DETECTIVE MCDORMAN: Thank you.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Al would you state your full name please?

A. Edmond A. McDorman.

Q. And your occupation?

A. Detective for the Harrisonburg City

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* * *

[676] Q. How did you know to look in this vehicle?

A. This came from some information provided from a Donna Tudor. She indicated that Tommy Strickler . . .

MR. BOBBITT: Your Honor I am going to object to what she told him.

JUDGE: All right.

MR. ERVIN: That's fine. As a result of what she told you, you went to this vehicle though?

A. That is correct.

Q. Now let me also show you Commonwealth Exhibit Number Thirty-one. A pair of jeans, do you recognize these jeans?

A. Yes sir. These are a pair of jeans that were turned over to me by Captain Fairweather the morning of the search on the Silvious property.

Q. Now there is two pair of jeans, is this a pair from Detective Farley or Captain Fairweather?

[677] A. To my recollection those are the ones from Captain Fairweather.

Q. O.K. Let me show you this pair of dirty jeans and ask you if you recognize these?

A. These are the ones that were hanging in a tree that were located near the vehicle search. Those there are a pair that, I believe they came from the property that had (inaudible).

Q. So these were found hanging in a tree?

A. In a tree near the vehicle.

Q. And these were obtained from the property itself.

A. From the household.

Q. O.K. Who took possession of these?

A. I took possession of these particular jeans from Captain Fairweather and put them with the rest of the evidence in the locked room.

MR. ERVIN: Judge we would offer these as evidence in this case.

JUDGE: Any objections?

MR. BOBBITT: No objections.

JUDGE: All right these jeans will be marked Commonwealth's Exhibit Number Thirty-five and will be admitted into evidence.

* * *

[691] MR. MOORE: Call Dianna Willeman.

CLERK: Would you raise your right hand please? Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MS. WILLEMAN: I do.

CLERK: Please take the witness stand.

DIRECT EXAMINATION

BY MR. MOORE:

Q. What is your full name?

A. Dianna Wren Willeman.

Q. And what is your professional field?

A. Currently I am employed as a Research Technologist at the Northwestern University in Chicago. Prior to that I was a Forensic Scientist working in the area of serology at the Bureau of Forensic Science in Roanoke, Virginia.

Q. All right. And how long were you working at the lab in Roanoke?

A. Approximately one year.

Q. And you were working there up until very recently?

A. Yes, until about the first of April.

* * *

[697] A. No they are not. They are found, the enzymes are found in the red blood cells in which everybody has red cells.

Q. Now were you asked to do any analysis in this Strickler case?

A. Yes I was.

Q. And were you given samples, known samples of blood from Mr. Strickler, the defendant and Ms. Whitlock, the deceased girl, and the boyfriend, John Dean?

A. Yes I was. I was given blood samples from all three of them.

Q. And now before you looked at the other items that were submitted, was there anything that you noticed about their three blood types?

A. Yes, from my first analysis on the blood to determine what their A B O type was, I determined that all three were A B O type O.

Q. So all of them had type O blood?

A. That's correct.

Q. O.K. And with regard to the enzyme values that you looked at on the three of them, was there anything unusual that you found? In Comparing Mr. Dean's and Mr. Strickler?

[698] A. O.K., yes. I did find that the blood samples on at least four of the enzyme types that I tested on them, they were exactly the same type.

Q. Does that have anything to do with your analysis on the other things submitted to you?

A. No it doesn't. Everything, you know, (inaudible), everything is, you know, what I receive and what my report says is what I got (inaudible).

Q. O.K. I just ask you that because that does appear on your report, is that right?

A. What?

Q. The fact that they were the same?

A. Yes it does.

Q. It doesn't (inaudible) on your conclusion (inaudible)?

A. No.

Q. O.K. Now were there several items seized from the scene or related to this case that you were asked to look at to determine whether, what the substances were?

A. Yes.

• • •

[705] Q. Now did you analyze some jeans that were submitted to you?

A. Yes I did.

Q. I hand you what is marked Exhibit Thirty-five, do you recognize these or anything on this?

A. Uh, hum, yes, the outside says that this is the item that I examined and also if we look on the inside, in the pocket, it will have the case number, the item number and my initials saying that I examined this piece of evidence.

Q. O.K. And these holes that are put in here, who put those there?

A. O.K. These right here, I put all these holes in here, I cut out samples to perform my analysis. Each one where I cut a hole has my initials by it saying that I removed the sample from the jeans.

Q. O.K. And did you draw any conclusions as to these jeans?

A. O.K. Yes I did. I found that, first of all, I tested four stains. I found that four of those stains were human

blood. I also tried to carry that a little further and determine [706] some of the blood types. And what I found is that one of the stains, I determined that it was a type O blood and also that in another blood type called PM was type C. There was also another stain, second stain that I examined, that I could say that my results indicated that that human blood on there was type O.

Q. All right. So that could have been blood from Leanne Whitlock?

A. That's correct.

Q. Did you also examine a black tank top shirt?

A. Yes I did.

Q. Do you recognize anything on this?

A. It's hard to see. But this is the shirt I examined and up in the top here, I have written the case number, the item number and also my initials with a red marker up there.

Q. Does this also have some holes in it?

A. Yes it does. You can see some areas on the back that I removed holes from, they are also circled.

Q. And this is Commonwealth Exhibit Seven, is that marked Commonwealth Exhibit Seven?

A. Yes it is.

* * *

[716] Q. I believe I failed to ask you about one other item, actually two other items you looked at, there was a green jacket?

A. Yes.

Q. Do you remember doing an analysis on that item?

A. Yes I do.

Q. That is included in your report.

A. Yes it is.

Q. I ask you, do you notice anything on that bag?

A. Yes, my initials and the case number on the back.

Q. This green army jacket, you also analyzed. Can you tell us, I'll have to take it out. It's Exhibit Thirty. Can you tell us whether there was anything on the jacket itself that shows to you?

A. Yes, I think it's right, if you can see right over here, again the case number and my [717] initials saying that I examined this item.

Q. O.K., and did you find anything on that jacket?

A. Yes I did. I need to refer to my notes. It takes me a while to sort through these. There were, on the green jacket, there were several different places, six different places where I found a stain that was positive for blood.

Q. Is that human blood?

A. Yes and that was human blood in four of the areas that I have indicated that there was blood. I determined that four of the stains were human blood.

Q. O.K. Now was there a second pair of jeans that you looked at?

A. Yes there was.

Q. Do you recognize these and anything on them?

A. O.K., this, the container has my initials and also the jeans should have my initials in here, case number and my initials.

Q. Did you find anything on those?

A. No I did not.

Q. O.K. If a pair of jeans or some cloth that has some type of stain on it or blood on it, was washed three or four times, would you [718] expect to be able to find anything to analyze?

A. I would not expect to. Occasionally you might be able to perform a test that would indicate that blood might be there but in most cases you cannot determine whether the blood was human or animal.

Q. Would that be true if it was washed once or twice?

A. Yes, that's true.

Q. Now, as you were doing your analysis for these stains, did you come across some hairs and the, on the impressions and the shirt and bra that was given to you?

A. Yes I did.

Q. And what did you do with those?

A. They . . .

Q. Did you forward them on to somebody else in the lab for further analysis?

A. Yes I did. I removed them from the items, put them in a sealed envelope and transferred them to the hair examiner.

* * *

[721] DIRECT EXAMINATION

BY MR. MOORE:

Q. What is your full name?

A. Michael R. Grim.

Q. And what is your professional field?

A. I am employed as a Latent Print Examiner and Impression Evidence Examiner for the Commonwealth of Virginia.

Q. When you say impression evidence, what are you talking about?

A. Primarily I am referring to shoe impressions, tire impressions and fabric impressions.

Q. Basically all types of prints. You look at for comparisons?

A. Yes sir.

* * *

[729] Q. Is there a term for those points where you compare one to the other and see the same thing?

A. Individual Identifying Characteristics basically is what they are referred to.

Q. And how many different points or characteristics do you like to match, what do you like to see before you

make a conclusion as to the identity of the two individuals?

A. There is no set number that is required in effecting identification, other than the State of Virginia or in the F.B.I. I personally have effected identifications on as few as seven characteristics and have testified to as few as eight characteristics. But that's not to say that I wouldn't testify to seven or that someday I may identify a print on as few as six but I feel very comfortable with seven characteristics personally.

Q. And in this particular case, did you make any identifications with any of the latents submitted to you, the lifts, with the known prints of either Strickler or Tudor or Wood or [730] Henderson?

A. Yes I did. I was able to identify eighteen latent fingerprints and one latent palm print with the fingerprints of Tommy David Strickler. I identified nine fingerprints with the fingerprints of Donna Kay Tudor Maddox and I identified one latent palm print as a palm print of Mark Wood.

Q. Were you able to make any matches from the car with Mr. Henderson?

A. No, I was not.

Q. Out of all the fifty-seven lifts and a piece of paper that you were submitted, how many latents were you actually able to use, of value, to work from?

A. There were a total of twenty-nine latent fingerprints, three latent palm prints and there was one latent impression which is either a portion of a fingerprint or a

portion of a palm print. I was not able to determine which portion of the hand that it would have come from.

MR. MOORE: O.K.

A. It could have also quite possibly come from a portion of the sole of the foot. It was strictly just friction ridges, a very small number of them but there was a sufficient number [731] to identify.

Q. So of the twenty-nine latent prints that you could work with, these lifts, are you saying eighteen of them came from Mr. Strickler?

A. Twenty-nine of the latent finger-prints, yeah, there were, out of the twenty-nine latent fingerprints, eighteen of them I was able to identify as fingerprints of Tommy David Strickler.

Q. And two from, I mean nine from Ms. Tudor?

A. That is correct.

Q. And then there were two, were the other two identifiable?

A. The other two fingerprints of value are identifiable but I was not able to identify them with the fingerprints of Strickler, Henderson, Maddox or Wood.

Q. O.K., so you could read them but you didn't have a match in those four people?

A. That's correct.

Q. You weren't given exclusion prints for Ms. Whitlock or Mr. Dean were you?

A. That's correct, I did not.

Q. O.K. Of the three palm prints that you could work with, one of those was Mr. [732] Strickler's, one of those was Mr. Woods and what was the third one, is that . . .

A. The other one remains, the third latent palm print remains unidentified, however, I did not have inked palm prints of Donna Maddox or Ronald Henderson as well as palm prints of any of the other individuals who had access to the items.

Q. O.K. Based on your twenty-one years plus of experience, how certain are you as to your conclusions of the eighteen fingerprints from Mr. Strickler?

A. I am one hundred percent sure.

Q. And you said you like to have, you are comfortable with seven to eight points of agreement. How many did you have on some of his prints?

A. Some of the latent prints has as few as twelve to fifteen characteristics where others were in excess of fifty characteristics in the latent prints.

Q. In excess of fifty points of agreement between the ones found in the car and the ones you looked at?

A. That is correct.

* * *

[736] Q. And you were given three lifts from the law enforcement officers?

A. Yes, they were part of the items that were submitted.

Q. Do you recognize these shoes here that are marked Commonwealth's Exhibit Thirty-two, is there anything on the shoes or the bag that you recognize?

A. Yes. I identify, I can identify these shoes as being the shores submitted in connection with this case, both shoes, there are laboratory case numbers as well as the item under and my initials.

Q. O.K. And were you able to make any identifications between those shoes and any of the three lifts that you were given?

A. I was on the lift items, well it was item 40-10, 40-29 and 40-30 were three lifts that were submitted from the item 40 package of lifts. Out of those three lifts I was able to identify two of the lifts or two of the shoe impressions on lift 40-29 and 40-30 as being made by the item [737] 27B, right shoe that was submitted.

Q. And with regard to the third one, did you make any conclusions at all?

A. It corresponded to the item 27A, left shoe with respect to design elements but as far as making a further determination, I was unable to, due to the indistinct nature and the fragmentary nature of the impression.

Q. So it is consistent with this shoe but you couldn't say for certain as the other two?

A. That is correct. It is the same sole design but there was just not enough there to positively identify.

Q. And you prepared a Certificate of Analysis also in this matter?

A. I did.

MR. MOORE: Your Honor I would like to have this Certificate marked, dated March 26th, Commonwealth's Exhibit Thirty-nine.

JUDGE: Any objection?

MR. BOBBITT: No objection.

JUDGE: All right gentlemen, I'm going to mark this Thirty-nine and it will be admitted into evidence.

* * *

[741] MR. MOORE: Call Myron Scholberg.

JUDGE: Myron Scholberg.

CLERK: Please raise your right hand. Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. SCHOLBERG: I do.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. MOORE:

Q. What is your full name?

[742] A. My name is Myron T. Scholberg, Scholberg is spelled S C H O L B E R G.

Q. And what is your professional field?

A. I am a forensic expert. My area of expertise is the examination of hairs, fibers, fabrics and related materials.

Q. And is that with the Bureau of Forensic Science of the Commonwealth of Virginia?

A. That is correct.

Q. How long have you been with the Bureau doing hair and fiber work?

A. With the State of Virginia since 1985.

Q. And who were you with before 1985?

A. I was with the Federal Bureau of Investigation until I retired in 1985.

Q. And your present position is a full time position?

A. Yes it is.

Q. And how long were you with the F.B.I.?

A. Twenty-one years.

* * *

[751] Q. But in terms of a hair falling out or being pulled out or being cut, what differences would you see in the root hair?

A. There would be a lot of difference in the root shape of a root that had fallen out naturally and a root that has been forcibly removed. A root that has fallen out naturally would be round and (inaudible) such as you see in the diagram. A root that has been forcibly removed will be shrivelled and distorted and you can look at it and just about feel ouch when you see it. It will be a lot different than a root that is (inaudible) which indicates that it could have been, fallen out naturally.

Q. And what is the difference in your terminology between a hair and a hair fragment?

A. I usually indicate a hair fragment to be a hair that does not have a root.

Q. O.K. Now can you from your microscopic analysis, conclude that a hair definitely came from one particular person?

A. No. Hair identification is not a positive means of identification. By that I mean [752] I cannot definitely say that a hair originates from a certain individual to the exclusion of all other people in his or her race group and the strongest or the most positive identification would be that the hairs are microscopically alike in all identifiable characteristics and could have come from that individual. They either originated from that individual or another individual whose hair characteristics are microscopically the same.

Q. So if you said they were microscopically alike in all identifiable characteristics, there is no higher degree of identification (inaudible)?

A. That would be correct.

Q. And if you were given a pool of two or three known samples and were given a hair that you knew came from one or the other, could you then identify with one of those three?

A. Hopefully yes. Maybe a few times during the year I will have a case that I will have known hairs that are so nearly alike that I can't tell the difference but very seldom does this happen.

* * *

[754] Q. And did you undertake to compare the sample hair to be analyzed with the two known samples that you had?

A. Yes I did.

Q. Did you draw any conclusions with regard to the hair in the impressions? That would be items A1 and C1.

A. Yes I did.

Q. And what were your conclusions?

A. The two items that were identified, A1 and C1, hairs from the impressions, I mounted on glass microscope slides in order that I might compare them with know hair samples that I had received. Item A1 contained eleven head hair fragments. These fragments were all of Negroid origin. Item C1, also identified as hairs from the impressions, contained approximately seventy head hair fragments, all of Negroid origin. When I compared them with the hairs identified to me as coming from Leanne Whitlock, I found that they were microscopically alike in all identifiable characteristics and my conclusion was that they could have originated from this individual.

[755] Q. And that level of conclusion, that they were microscopically alike in all identifiable characteristics and could have originated, do you ever give any identification more certain than that?

A. No.

Q. And did you examine any hairs identified as having come from the shirt and bra that has previously come into evidence?

A. Yes I did.

Q. And what did you (inaudible) that?

A. This is identified as my item 2, hairs that were removed from a shirt and a bra. Among the hairs removed from the shirt and bra, I found a Caucasian head hair fragment and two Caucasian head hairs that when compared with the Caucasian hairs identified to me as coming from Tommy Strickler, were microscopically alike in all identifiable characteristics. My conclusion again was that they could have originated from this individual. Two of the, the two Caucasian hairs that had roots, also had roots which were distorted and shrivelled and had been forcibly removed from the skin surface. In addition to these hairs then, I found another brown head hair of Caucasian origin. When I compared it with the [756] hairs coming, identified to me as coming from Tommy Strickler, I found that it was microscopically dissimilar. Based on the known hair sample that I had to compare, it would be my conclusion that it did not originate from this individual.

Q. And the two, you said from the shirt and the bra that appeared to be microscopically alike to the defendants, there were two head hairs and one fragment?

A. That's correct.

Q. I take it the fragment was one where the root was not intact?

A. No root.

Q. O.K., but the one you said that the roots were distorted and shrivelled, it appeared that those two were forcibly removed?

A. That's correct.

Q. All right, and you examined a third, a hair that came from a third item, from the cap?

A. Yes.

Q. Did you find any hairs in that that you could make any conclusions about?

A. This was my item one, identified as hairs removed from a cap. I, in this particular item there were twenty head hairs and head hair [757] fragments. When I compared them, and they were of Caucasian origin, when I compared them with the hairs identified as coming from Tommy Strickler, I found that they were microscopically dissimilar and again based on the known sample that I received, it would be my conclusion that they could not have originated from this individual.

Q. O.K. Of all the hairs or fragments found in that cap, you found not related to Mr. Strickler?

A. That's correct.

Q. That was microscopically similar?

A. That's correct.

Q. And the one hair with the shirt and the bra that were not like Mr. Strickler's, do your notes indicate anything about the color of that or whether anything says that was not the same type as the one in the hat?

A. I don't have anything to indicate the color. I have it as a Caucasian head hair, microscopically different from those identified as coming from Mr. Strickler.

Q. All right. I want to ask you one other thing. You mentioned about the hairs in the impression, the Negroid hair that matched up with Ms. Whitlock's. You said something about it being [758] torn or cut. What led you to that conclusion?

A. Well the microscopic examination would reveal ends that would be torn or cut and these were fragments so there were no roots there but the hairs had jagged ends and gave that appearance.

Q. And did you prepare a Certificate of Analysis setting out your findings in this?

A. I did.

MR. MOORE: I would like this Certificate dated May 8th marked Commonwealth's Exhibit Forty-one.

JUDGE: Any objections?

MR. BOBBITT: Two pages?

JUDGE: Yes sir.

MR. BOBBITT: No objections.

* * *

[767] MR. BOBBITT: Your Honor we would like to call Kenneth Workman. Mr. Workman would you walk over to the Clerk's desk and be sworn?

CLERK: Raise your right hand please. Do you swear or affirm all the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. WORKMAN: No audible answer.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Mr. Workman would you state your name please?

[768] A. Kenneth Lee Workman.

Q. Can you speak up a little bit?

A. Kenneth Lee Workman.

Q. Where do you live Mr. Workman?

A. Rockingham County.

Q. Rockingham County. Where did you live in January of this year?

A. Timberville. Plains Apartments.

Q. Did you know Ronald Henderson?

A. Yes sir.

Q. How did you know him?

A. I met him through another friend.

Q. Did he come to your house early in the morning of January 6th?

A. Yes.

Q. What happened when he came there?

A. He came in there and had blood and stuff on his pants, talking about he killed a nigger.

Q. Did he say that to you?

A. Yes sir.

Q. Do you know how he got there?

A. He said some guy brought him there named Stoney and when he went to leave, the guy was gone so he came back in.

Q. Came back into your house?

[769] A. Yeah.

Q. Did he end up spending the night there at your house?

A. No, he set there for a couple of hours.

Q. A couple hours?

A. Yeah.

Q. What time was it when he got there?

A. When he got there?

Q. Uh, hum.

A. I'd say about four-thirty, five in the morning.

Q. Are you sure it was blood on his pants?

A. Yeah because he, you know, would keep talking about it.

MR. BOBBITT: I don't have any other questions.

CROSS EXAMINATION

BY MR. ERVIN:

Q. Mr. Henderson had been drinking when he came to your house, hadn't he?

A. Yes sir.

Q. He was pretty well drunk at the [770] time?

A. Yeah. That's why I didn't believe him.

Q. And he told you that his friend Stoney was outside?

A. Yeah.

Q. And then later on he left your house and came back a few minutes later, right?

A. Yeah because he was cussing because the guy took off and left him.

Q. Stoney took off in the car and left him there, right?

A. Yeah.

Q. And you never saw who all was in the car outside?

A. No I didn't even see the car pull up.

MR. ERVIN: I have no other questions Judge. Thank you.

MR. BOBBITT: No other questions. May he be excused Judge?

MR. ERVIN: That's fine Judge.

JUDGE: You are free to go Mr. Workman.

MR. BOBBITT: Lillian Meadows. Ms. Meadows could you go over there and be sworn please?

[771] CLERK: Raise your right hand please. Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MS. MEADOWS: I do.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Ms. Meadows would you state your name please?

A. Lillian Sue Meadows.

Q. And are you related to Tommy Strickler?

A. Yes sir, it's my brother.

Q. Where do you live Ms. Meadows?

A. Quicksburg.

Q. What county is that in?

A. Shenandoah County.

Q. Did your brother come by your house sometime on Saturday, January 6th?

A. Yes sir.

Q. What time did he come by?

A. The first time he was there was somewhere around eight o'clock and we was still in [772] the bed and he just went on down the road, he never stopped, he blowed the horn and nobody got up so I mean, you know, he just went on. The second time he came back was approximately ten o'clock, somewhere around that area. That's when he did come in the house and talk to me.

Q. Was anybody with him?

A. Donna Kay was with him.

Q. Donna Tudor?

A. Uh, hum.

Q. Did your brother, did Tommy come in the house to talk to you?

A. Yes.

Q. Did you see what he was wearing?

A. Yes, he had on a pair of blue jeans.

Q. Was there any blood on the blue jeans?

A. No sir.

MR. BOBBITT: I don't have any other questions.

* * *

[780] DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Ms. Silvious would you state your name please?

A. Irene May Silvious.

Q. And are you Tommy Strickler's mother?

A. Yes sir.

Q. Where do you live Ms. Silvious?

A. I live in New Market, Virginia, right out of New Market on 620.

Q. And do you live there with your husband?

A. Yes sir.

Q. What's his name?

A. Raleigh Edward Silvious.

Q. They call him Ed?

A. Yes.

Q. Were you and your husband and your daughter there at your house on January 6th, Saturday morning?

[781] A. Yes sir.

Q. Did you see Ronald Henderson at that time?

A. Yes I did.

Q. How did that come about?

A. Well he came to our house and he came down the path and my daughter and my husband went out first

and then I followed behind them. And he was asking if Stoney was there and they were telling him no and he said you know who I am talking about don't you, I'm talking about Tommy and he is not here? And they said no he is not here and so he said well he, he's got my cousin's car from West Virginia and he said we have got to find him, said we've got to find him. And my husband said did you go to the law and he said, no we aren't going to the (F) law, he said, but he said that's all right, we'll find him tonight where he was last night, said he'll be at Dice's Inn and he said we will kill the (F) (SOB)?

Q. Did he go down to the car?

A. He asked to go out the road where we own some property to where he wanted to check and see if Tommy's clothes were still in the car and my daughter said well, she said we have part interest, I have part interest in that land and I [782] don't think it is any concern of yours about Tommy's clothes being out there.

Q. But did he eventually go on down there?

A. He kept working his way up the path towards the road to go out that way and he kept insisting that he go out and look and so finally Ed said well just let him go look, you know, so he went out the road, it's not very far and so he didn't come back for awhile and so I said to Ed, I said well just how long does it take him to just walk out there and see if the clothes are in the car and leave? And Ed said well I don't know if I ought to go on out so I suggested so am I. So we walked out to the place and when we got out there in sight, he, Henderson was laying on the hood of the car on his back and I couldn't exactly tell at that point what he was doing, you know. And so

then as we kept getting closer, he come off the hood of the car and until we got up there, he was putting on some shoes and socks. And I walked on up to him and as I got right at him, we went back to the car, the door was open and I said, I looked at him and I said wait a minute. I said you've got Tommy's blue jeans on and I said you cannot take his clothes like this and I said I bought [783] those clothes for him for Christmas and I said you get on the other side of that car and I'm going to turn my back, I won't turn around and look at you and my husband was standing there and I said you take those clothes off and put yours back on. So he was standing here at this open car door and he says O.K., so I turned my back and in just a little bit he slams the car door shut and out the road he goes running by me. And I said hey don't take those clothes and he just kept running. So I went to the car and I don't know what else he put in the car but I do know his dirty blue jeans were there and I caught ahold [sic] of them and give them a sling down the road and they sort of hung in an old locust limb or something there. And when the law came to our house, I told him where the blue jeans were and they got them.

Q. O.K. Now later, about a week after that, did you see your son Tommy?

A. Yes I did.

Q. And how did you happen to see him?

A. He called me and ask me to come to town and pick him up and I went in and . . .

Q. Who was with him then?

A. Donna Tudor.

Q. Did you pick the two of them up and [784] bring them back to your house?

A. Yes I did.

Q. Did you wash some clothes for Tommy at that time?

A. Yes sir.

Q. What did you wash?

A. Well, some things of hers and his blue jeans and shirts and just regular clothes.

Q. Did you notice whether the blue jeans had a hole in them?

A. Not at that time, I did not until after I took them out of the dryer, I noticed the hole in his blue jeans and I said what happened to your blue jeans Tommy. And she said he burned them with a cigarette.

Q. Did those, did those blue jeans have any stains on them, any blood stains?

A. No sir.

Q. O.K. And where those blue jeans at your house when the police came?

A. Yes sir. They were still folded in the bag that they were brought from the laundry in.

MR. BOBBITT: O.K. I don't have any other questions.

[785] CROSS EXAMINATION

BY MR. ERVIN:

Q. Did your son ask you to wash these for him?

A. Yes sir. He said could we wash our clothes and I said yes you can.

Q. And you say there were no stains on them. Did you take the pants and hold them up and look at them?

A. Well no sir I did not but I seen him get right in the car with me when I picked him up from town and he rode right in the front seat with me and . . .

Q. And were those the same pants he had on that you washed?

A. Yes sir. He went home and changed his pants and they were the ones that, that were washed.

Q. And this was on January 11th, right?

A. Yes.

Q. So from January 5th until January 11th, you don't know what he did with those pants whether he washed them or anything else, do you? Really, truthfully you don't really know?

A. Well no I don't. He, I only know he [786] had no other clothes, he had only what he had on.

Q. Your son went to Virginia Beach, didn't he?

A. That was to my knowledge, I have only hearsay.

Q. Did he come by your house before he left for the beach?

A. No sir.

Q. And this Mr. Henderson, did you know Mr. Henderson before that day?

A. He was at my house the day before with Tommy.

Q. He was with your son at your house on January the 5th, right?

A. Right.

Q. And how long did they stay at your house?

A. Well they came to Harrisonburg with me that day and I let them out in Harrisonburg.

Q. And where did you let them out at in Harrisonburg?

A. I'm not quite sure, I think it was the First Virginia Bank I went into and they got out of the car there.

Q. And when you let them out, they didn't have any vehicle or anything with them, did [787] they?

A. No sir.

Q. Tommy usually has a small hunting knife that he carries on his belt, doesn't he?

A. Yes sir.

Q. And he always has that with him?

A. Yes sir. It belonged to his father.

MR. ERVIN: I have no other questions Judge. Thank you Ms. Silvious.

* * *

[797] MR. BOBBITT: We would like to call Jay Tudor.

CLERK: Would you raise your right hand please? Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. TUDOR: No audible answer.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Mr. Tudor would you state your name please?

A. Jay (Inaudible) Tudor.

Q. How old are you?

A. Twenty-one.

Q. And are you married to Donna Tudor?

A. Yes sir.

Q. Where do your parents live?

[798] A. Augusta Springs.

Q. Did you see Donna Tudor sometime in March of this year?

A. Yes sir.

Q. Exactly when was it?

A. About the third week.

Q. In what month?

A. In March.

Q. And where did you see her?

A. At my dad's trailer.

Q. How did it come about that you saw her at that time?

A. She came out to visit.

Q. And did you at that time talk to her about this case?

A. Yes sir.

Q. Did she tell you whether she was present at the murder scene?

A. Yes sir.

Q. What did she say?

A. That she was.

Q. Did she tell you whether Mr. Strickler participated in the murder?

A. Yes sir.

Q. What did she say?

A. No he didn't.

[799] MR. BOBBITT: I don't have any other questions.

CROSS EXAMINATION

BY MR. ERVIN:

Q. What did she tell you rather than just answering yes and no questions, what did she tell you?

A. She was telling me that she was picked up by the girl.

Q. She was picked up by who? By the girl?

A. Yes sir.

Q. And where did she say that she was picked up at?

A. Blackburn Addition.

Q. O.K. So a girl picked her up at Blackburn Addition, where is that located? Is that here in Staunton?

A. Yes sir.

Q. O.K. So the girl picked her up at the Blackburn Addition, what else did she tell you?

A. They went to Harrisonburg and they rode around and went and purchased some reefer or [800] something. And they were, I can't remember if they were unable to get it or not and then time went on and they went to the corn field and . . .

Q. When did the two men get with them?

A. They were in the car with them.

Q. So when the girl picked Donna Tudor up in Blackburn Addition the two men were already with the girl?

A. No they (inaudible).

Q. Do what?

A. She told me they went by and picked them up.

Q. Who came by and picked them up? That she and the other girl?

A. Yeah.

Q. Went by and picked the two men up?

A. Yes sir.

Q. And where did she say they picked the two men up?

A. She, I don't recall.

Q. O.K., so she said that she and the other girl got together. The other girl came down and picked her up at Blackburn Addition, then they went and picked up two men, right?

A. Something like that.

Q. Well is that right?

[801] A. As much as I can recall.

Q. O.K., and then what did she say happened? That they rode around for a while?

A. Yes sir.

Q. And then they went to the corn field?

A. No it was a couple days.

Q. What?

A. It was a couple days later.

Q. A couple days later?

A. Yes sir.

Q. That they went to the corn field?

A. Yes sir.

Q. What happened then?

A. She told me her and the Strickler boy was in the car at the time. That the other boy and girl was outside the car and she tried to get away, escape and the other fellow jumped on her and started beating her and couldn't stop.

Q. And that he killed her?

A. Yes sir.

Q. And what did she tell you he beat her with?

A. His fist and I think she said a rock.

Q. His fist and a rock?

[802] A. His fist and I believe, a rock.

Q. This rock you are talking about, you talked to Sergeant Campbell yesterday, didn't you?

A. Yes sir.

Q. And he asked you how, what Donna Kay told you how the girl was killed, didn't he?

A. Yes sir.

Q. And you told him yesterday that Donna Kay told you that the man, Henderson used his fists to kill the girl?

A. That's right sir.

Q. You never mentioned the rock to him, did you?

A. No sir.

Q. First time you mentioned this rock was when you saw it in the Courtroom today, wasn't it?

A. No sir.

Q. When did you mention it before? You didn't tell Sergeant Campbell did you?

A. No sir.

Q. Why didn't you tell Sergeant Campbell?

A. (Inaudible).

Q. What?

A. I didn't remember it.

[803] Q. You didn't remember it. You remember it today but you didn't remember yesterday?

A. I tried to call him back yesterday evening. You can call his secretary and ask her, you will find out that I called yesterday evening at five forty-five.

Q. So you talked to him twice yesterday, didn't you?

A. Yes sir.

Q. And both times he asked you how was the girl killed, right?

A. Yes sir.

Q. And both times you said Donna Kay told you the man beat her with his fists, right?

A. Yes sir.

Q. And you never mentioned the rock to him, did you?

A. No (inaudible) first time.

Q. Have you ever been convicted of a felony before Mr. Tudor?

A. Yes sir.

Q. How many?

A. One.

Q. And what was that?

A. Breaking and entering.

[804] Q. Are Donna Kay Tudor and you all still married?

A. Yes sir.

Q. And she separated from you, didn't she?

A. I separated from her.

Q. You separated from her?

A. Yes sir.

Q. And she is living with another man now, right?

A. I don't know.

Q. You don't know at all?

A. No sir.

Q. You have no idea?

A. No sir.

MR. ERVIN: You told, never mind, I withdraw that question. I have no other questions Judge.

MR. BOBBITT: No other questions.

JUDGE: All right Mr. Tudor.

MR. BOBBITT: Your Honor we rest.

JUDGE: Mr. Ervin.

MR. ERVIN: We have no other witnesses Judge.

* * *

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

* * *

[806] JUDGE: All right Sheriff. Ladies and gentlemen of the jury, the following instructions which will now be given to you by the Court are [807] the laws of the Commonwealth of Virginia which applies to the evidence which has been introduced in this trial. You are to consider and read these instructions in their entirety, all of the instructions in their entirety, constitute the law in this case. And now when you retire to the juryroom to deliberate and reach a verdict, reach a unanimous verdict on each of the charges, you will consider all of the instructions which are now given to you. Members of the jury, I'm going to read them to you at this point and when you go to your juryroom, you will have the instructions, will have all of the exhibits with you. The defendant is presumed to be innocent. You should not assume that the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt. Nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However suspicion or probability of guilt is not enough for a conviction. There is no [808] burden on the defendant to produce any evidence. A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the

evidence in the case. The fact that the defendant has been indicted by a Grand Jury is not evidence against him and you should not consider it. You are the Judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified. Their interest in the outcome of the case, their bias and if any has been shown, their prior inconsistent statements or whether they knowingly testified untruthfully as to any material fact in the case. You may not arbitrarily discard believable testimony of any witness. However after you have considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly. [809] During the trial, evidence was introduced that a witness had previously made a statement that was inconsistent with his or her testimony at this trial. The only purpose for which that evidence was admitted was its bearing on the witness's credibility. It is not proof that what the witness may have said earlier is true. You may consider proof of a witness's prior conviction of a felony or of a crime involving moral turpitude as affecting his credibility but it does not render him incompetent to testify. The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that the defendant

killed Leanne Whitlock. And two, that the killing was willful, deliberate and premeditated and three, that the killing occurred during the commission of a robbery while the defendant was armed with a deadly weapon or occurred during the commission of abduction with intent to defile or to extort money or a pecuniary benefit or was of a person during the commission of or subsequent to rape. If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the [810] defendant guilty of capital murder. If you find that the commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of capital murder. Willful, deliberate and premeditated means a specific intent to kill, adopted at sometime before the killing but need not exist for any particular length of time. A deadly weapon is any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which it is used. The Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that

caused the victim's death. [811] If you do not find from the evidence that the defendant is guilty of capital murder, then you may consider the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that Leanne Whitlock was killed. Two, that the killing was malicious. Three, the killing occurred in the commission of a robbery, rape or abduction. Four, that the defendant was a participant in the commission of this robbery, rape or abduction and five, that the defendant or another participant in the commission of this robbery, rape or abduction killed Leanne Whitlock. If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you can find the defendant guilty of first degree murder and fix his punishment at one, imprisonment for life or two, a specific term of imprisonment but not less than twenty years. If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt then you shall find the defendant not guilty of first degree murder. Malice is that state of mind which results in intentional doing of a wrongful act to another [812] without legal excuse or justification at a time when the mind of the actor is under control of reason. Malice may result of any unlawful or unjustifiable motive. Malice may be inferred from any deliberate, willful, cruel act against another however sudden. You may infer malice from the deliberate use of a deadly weapon unless from all the evidence you have a reasonable doubt as to whether malice-existed. You have been instructed on more than one grade of homicide and if you have a

reasonable doubt as to the (inaudible) of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of the lesser offense. For example, if you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty. Under the murder indictment against the defendant you may return any one of the following verdicts, which verdict must be unanimous. One, guilty of capital murder. Two, guilty of murder in the first degree. Three, not guilty. The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. [813] One, that the defendant intended to steal and two, that the motor vehicle and other personal property was taken and three, that the taking was from Leanne Whitlock or in her presence and four, that the taking was against the will of the owner or possessor and five, that the taking was accomplished by violence to the person or the threat of serious bodily harm. If you find from the evidence the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of robbery and fix his punishment at confinement in the penitentiary for life or for a specific term but not less than five years. If you find the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty. The defendant is charged with the crime of abduction. Kidnapping and abduction are the same

crime. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that the defendant by force or intimidation did seize, take, transport, detain or hide Leanne Whitlock and two, that the defendant did so with the intent to obtain money or other benefit of value or with [814] the intent to defile Leanne Whitlock and three, the defendant acted without legal justification or excuse. If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at confinement in the penitentiary for life or for a specific term but not less than twenty years. If you find the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty. Extort means to compel someone to part with something of value. Pecuniary benefit means that everything that can be valued in money. To defile means to sexually molest. It is not necessary that each and every element of the offense be proved by direct evidence. For an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone or on circumstantial evidence combined with other evidence, if you believe from all of the evidence that the defendant is guilty beyond a reasonable doubt. When the Commonwealth relies on circumstantial evidence, the circumstances must be consistent, [815] proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt however strong or even a probability of guilt. The evidence as a whole must

exclude every reasonable theory of innocence. If you find the defendant guilty you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards. Members of the jury, that, those are the instructions in this case. We will now proceed with the closing statements of the attorneys.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

[815] MR. ERVIN: May it please the Court. Ladies and gentlemen first of all let me do thank you for being so patient. This has been a long drawn out procedure, it is a very important procedure. It is important to both Mr. Strickler, the family of Leanne Whitlock, to every person here in Augusta County so I do thank you for bearing with us these last four days. In my opening statement I told you what the Commonwealth was going to prove. Now I submit to you that we have proved each and everyone of these things that I told you about. Look at the evidence in this case. There are several things which really [816] cannot be disputed beyond any doubt, beyond any question at all. First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfus said that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then he and another man and another girl all drove off with Ms. Whitlock. She was brought here to Augusta County where she was detained, where she was taken by abduction. Absolutely no issue about that. Second of all, I submit to you that there is no issue why these two men did it. They did it, one, to rob her, to obtain something of benefit from her (inaudible) and also they did it so that one or both men could rape her. No question about that. Now the laboratory technician who testified said there was sperm present. She cannot say whose it was. She can't say it was this man's. It does not appear

to be this man's (inaudible). But Mr. Henderson has not been arrested, his cannot be tested. Look at all the evidence when you consider that the fact that this young girl was found nude in the woods and that there was sperm present. The last time that [817] Leanne had had sex with somebody had been the night before, eighteen or twenty hours before and yet the sperm was present when the body was recovered so there is no question why they intended to abduct her. They wanted to rob her and they wanted to sexually molest her. And third, there is no issue at all that these two men acted without any reason at all, any legal justifications. So those three thing I submit to you really are not in question at all. Another thing that is not in question, Leanne Whitlock was robbed. Absolutely no question about that. The last time that she was seen by her friends, she had her boyfriend's car, she had just gotten paid in cash from her job which she had in her pocketbook. She had her ID cards in her pocketbook. She had her watch and one of the witnesses even remembered her having her pearl earrings on. When she was found, she had nothing, absolutely nothing at all. So there is no question at all that she was robbed. There is no question at all either that she was murdered, that is a given fact in this case. Somebody willfully, deliberately and with premeditation killed and murdered Leanne Whitlock. And really there is no question that this was during the commission of [818] robbery or abduction or rape. One or all three of those. Really no question about that. There is no question as to what the murder weapon was I suggest to you. This thing right here, sixty-nine pound rock was found there at the murder scene beside two holes and what was found on the rock? Human

Blood. And what happened to Leanne Whitlock? Her head was smashed in with some object which the medical examiner said very possibly could be a rock like this. There is no question about the murder weapon. There is no question where it happened. It happened about twenty-five to thirty yards from where the body was found. And we know that because of the two indentations there. The small one and the large one. You all can get the feel of this size of these indentations from these casts. Not only were they found there but what was found in them? Human blood and hair that matched Leanne Whitlock. Hair that had been forcibly removed from her head. Hair that had come out when this rock was hurled down on her head. There is no question about that. Now what is the difference in the size of these rocks, I mean these imprints, indentations, why is one so much bigger than the other one? Very simple reason for that. Dr. Oxley, the [819] medical expert, testified that she was hit at least three times with this object. What I suggest to you is that she was hit once, her head was driven down about three inches into the ground. She was either rolled over or bounced over when the rock hit her. The rock was taken up again and thrown down against her head again, driven down another three inches into the ground and then just to make sure, a third time it was thrown down in the same place and that is why you have one so much larger than the other one. The evidence is exactly consistent with Dr. Oxley's testimony. So it is really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is to [sic] big to be called a rock and to [sic] small to be called a boulder. I don't know what you call it, I'll

just call it a rock but this rock here, sixty-nine pounds, was the murder weapon. Those things can't really be disputed. Now the first question that you have to deal with is who was involved, who committed abduction, who committed a robbery, who was involved in the murder. Who was there. Ladies and gentlemen there were at least three people there based on the evidence. One, there was a man by the name of [820] Ronald Henderson. One was an unknown white female that has not been discovered yet. And the third one, was this man sitting right here. I submit to you that is beyond any question at all. Look at the evidence, excuse me. Look at the evidence that you have connecting this man with the case. First of all, is the testimony of Virginia Smith and Donna Warner. They were both at the mall. They ran into Mr. Henderson and Mr. Strickler. Donna Warner knew them before. She talked to Henderson, Stoney here was introduced to her, positive ID and Virginia Smith, the head of Security at Valley Mall. What did she testify to? She was trying to watch these two men because they were suspicious, they were acting suspicious. And she tried to follow them around all that afternoon. And the last time she saw them was about six forty-five P.M. and they were heading away from where she was down here, up to the northern part of the mall to where the main entrance is. That is at approximately six forty-five. So she puts them going towards where Leanne was kidnapped at the approximate time that it happened. You have the testimony of Leanne's roommate who says yes she left the house at approximately six forty-five to go to the mall to [821] take her boyfriend's car back. So you have the two men and you have Leanne coming together there at the mall. And

we are lucky enough to have an eyewitness who saw that happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stolzfus was there, she saw that happened. She said she had been inside the mall and she ran into these two men and this girl. And she named the two men, "Shy Guy", Mr. Henderson, "Mountain Man", the defendant in this case. And she said the defendant was acting wild. He was agitated. She became nervous around him so she was trying to keep an eye on him. She didn't know what he was going to do. Finally she finished her business in the mall. She and her fourteen year old girl went outside, got in their car, proceeded to go home. The next thing she knew she got behind the vehicle of Leanne Whitlock. Right in this area here. They proceeded down to approximately where the main entrance is. And what happened then? "Mountain Man", the defendant, came running out of the mall, ran up to this van, tried to evidently get a ride, (inaudible) ride with a van, couldn't do it. He got mad, he banged on the side of the van. He ran [822] back to a truck, couldn't get in the truck either so he ran back to the mall and all of a sudden comes running back out and that's when he goes to Leanne's vehicle. Ms. Stolzfus was right behind her. She said that this man tried to get the door open and Leanne tried to stop him, she kept trying to lock the door. All of a sudden the door flew open. He jumps in. He doesn't sit in the passenger's seat but moves over right next to Leanne. That's when these other two people come out of the mall, come to get in the car. Leanne can't be here today to testify. But her actions that day shows what was going on in her mind. At that point she decided to

take a chance. She leaned on the horn, blew the horn, kept her hand on the horn. The two people ran back to the mall and what did this guy do, did he get out? No he started hitting her and he hit here and he hit her until he made her quit blowing the horn. And then the other two people came back out and got in the car. Ms. Stolzfus drove up beside the car and she said I kept asking the girl was she alright, was she alright? The girl wouldn't say anything. She said when the girl, I asked her, she would look at me and she looked down beside her. She looked at me and then looked down again. Why was that? I [823] suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. That was pressed right up against Leanne. So the witness drove on by. As she drove by, Leanne mouthed the final words that any decent citizen heard her say and that was help. That was how she was feeling, she was desperate right there. So Ms. Stolzfus pulled over and Leanne's car started driving away. She blew the horn again trying to get help. It didn't work. Ms. Stolzfus positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him. Ms. Stolzfus followed them a little ways and then turns away. It was the last time Leanne was seen alive by anybody. What do we know happened next from the evidence? And that is all we are concerned with today is the evidence that was presented. The evidence shows that approximately half an hour to forty-five minutes, Kurt Massie, who has nothing at all to do with this case, was driving down, or was riding with

with another man, coming down 340 to go pick up his little girl. When they approached the [824] entrance to this field, Mr. Massie was going north on Route 340, he said there was a slow car coming the other way, some other cars passed it so they had to stop almost, come to a complete stop. That he knew this road from younger days when they used to go down there and drink beer and party. He knew where it was. He knew how muddy it was. And he was able to see that there were at least three, possibly four people in the car. He was able to see two white men and a white girl. He said I can't identify the white man that was in the back seat. I can't identify the white girl but I can positively and absolutely identify the driver. And who was the driver? This man right here. The Commonwealth has placed him driving the murdered girl's car down into the scene where she was actually murdered. Just a half hour to forty-five minutes after she was first kidnapped. That is very strong evidence right there, putting him there at the murder scene. What happened next in time? Well approximately a half hour later, eight o'clock, this was at seven-thirty that Mr. Massie saw them. Eight o'clock at Buddy's Market right out there on 340 near the place, Lee Smith sees this car, a small blue car, with West Virginia tags, two men in it. A dark haired man and a [825] blonde haired man. He says I can't identify them today but they were there. This was at eight o'clock. There were no girls with them. We know what happened to Leanne Whitlock, her head was bashed in. We don't know what happened to the white girl. At that point, she disappeared. Maybe she was down in the back seat hiding, scared to death. Maybe she had taken off, nobody knows. But these two men are still in the car at

eight o'clock. So we lose them for about an hour after that. This is eight o'clock. The next thing you know, nine o'clock, where do they show up to have a good time? Dice's Inn here in Staunton. There is not just one or two witnesses, three or four witnesses who can place them at Dice's Inn. They came in, their hands were dirty. They started dancing and drinking beer, having a good time. Mr. Strickler here picked up Donna Tudor. Mr. Henderson tries to pick up Nancy Simmons, he even gives her a watch, real nice of him, giving away a dead girl's watch to Nancy Simmons. They stayed there until the place closes and when they close they leave. Donna Tudor, Tommy Strickler, Ronnie Henderson. And what do they leave in? They leave in Leanne's boyfriend's car and they take off. Later on the car is recovered, fingerprints taken [826] and this man's fingerprints are all over that car. His footprints are all over the car. His own sister said that the day after the murder he was down at her house in a little blue car. Lunchtime the day after the murder he was seen in New Market in this little blue car with a West Virginia tag and he is also very good to his new girlfriend. Because he is good enough to give her a nice pair of earrings, Leanne Whitlock's earrings, that she was wearing when she was murdered. Ladies and gentlemen I submit to you that there is no question, really not an issue. This man abducted Leanne Whitlock, he did so for the purpose of robbing her, to obtain money or other benefits from her and he did in fact rob her. He took her car, he took her earrings, he took her credit cards, identification cards which he and Donna Tudor tried to use down at Virginia Beach. He took all those things. So there is really no issue about the robbery and abduction charge.

The only issue in this case is whether or not this man is guilty of capital murder or first degree murder. That is what this whole case is all about. He is guilty of one of the two and you have to decide which one he is guilty of. Capital murder, the Judge has given you instructions on [827] that. What this instruction says is the Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death. In Virginia the person who actually kills another person, is the only one that can be convicted of capital murder, however, if two people jointly beat somebody to death, then they are both guilty of capital murder. So if you believe in this case that Mr. Henderson and the defendant jointly beat Leanne Whitlock to death, then he is guilty of capital murder. If you believe that Mr. Henderson alone killed Ms. Whitlock and that this man was just there watching or sitting in the car or doing something else, [828] looking the other way and didn't take part, then he is not guilty of capital murder, he is guilty of first degree murder. Those are your only two choices or not guilty and the evidence does not justify not guilty. Who killed her? I submit to you it

was Ronnie Henderson and Tommy Strickler, the defendant in this case. It is a shame that the only people that were out there was Tommy Strickler, who is on trial today. Ronnie Henderson who is still on the run. This unknown white woman who can't be here today because nobody knows who she is. And Leanne Whitlock who is dead. Those are the only four people who can be here to give direct testimony about what happened. Since you don't have these four people you must look at the other evidence in the case. Let's start with Donna Tudor. Ms. Tudor, no offense as you notice, is not the smartest person in the world. It is true that she was arrested up in Harrisonburg. She was charged with Grand Larceny of this vehicle and she agreed to testify to try to get the charge against her dropped. It is no question about all those things, we agree with those. But does that make her a liar about what she testified to. Look at what she said. She said she was with the two men that night at [829] Dice's. She got there at eight o'clock. There is three or four witnesses who put her there at eight o'clock. She was not with them over there in that corn field or in the woods. She couldn't have been because of the time period. She was at Dice's. Even before they arrived, a hour or more before they arrived, so she could not he [sic] there. They picked her up. She went with them. They were driving around, Henderson was all upset. He was driving recklessly, almost ran into a truck. Mr. Strickler pulled his knife out and said I will kill you if you don't calm down, it shows he had his knife that night. Henderson calmed down and they rode around for quite a few hours that night trying to get marijuana. Went to two or three houses. The first thing that Ms. Tudor was able to

tell us, was about them talking between the two of them. She said they were talking and joking. They were talking about "it" in a rock crusher. And she assumed that whatever "it" was, they put it in a rock crusher. But is that what these two men talked about? Were they making a sick joke about this rock being a rock crusher or were they talking about how the rock crushed her. Ladies and gentlemen there is no way Donna Tudor could have known about this rock crushing this girl when [830] she was arrested and talked to the police unless somebody told her. That what the whole thing (inaudible) if you believe everything else that she is bias [sic], which she may be, she has a reason for coming here testifying which she does, that doesn't change the fact that she knew about this rock and the rock crusher. What else do you have though? She said she talked to Tommy. That they were talking about "it", that they started calling "it" a nigger. That she talked to her new boyfriend, Tommy Strickler about "it", she talked to him about the cut on his hand. She said he had a cut on his knuckles and that is important ladies and gentlemen. That is something you expect when you are dealing with a rock like this one. When you are trying to pry the rock up out of the ground to use. You expect little cuts and bruises. So that is important and you saw that no other witness that testified disputed that. Nobody even mentioned it. Nobody was asked about it. She said he had a small cut on his knuckle. And she asked him about the cut on his hand and what did he say? Well I got into a fight with "it". And she said well "it", is it a female or a male? He wouldn't tell her. When she said well is "it" black or white and he said "it" is a [831] nigger. He said I kicked

"it" in the head. It's not going to cause me anymore trouble. Why did he say that? He said that because he had killed Leanne Whitlock out there. He knew she couldn't testify against him. She had fought with him in the car. She had caused some trouble but he had gotten rid of "it". That's a terrible way of referring to somebody as "it", but that is what he was doing. They went to Virginia Beach, spent a few days down there, tried to use Leanne's credit card, couldn't do it, couldn't figure out how to do it. Came back from Virginia Beach. One of the first things he got his mamma to do was wash his pants for him. Why was that? Donna said there was blood on them. We know there was blood on Henderson's pants, if those were Henderson's pants, the ones that were in the tree at Mr. Strickler's mother's house. We know those were bloody. Ms. Strickler, Mr. Strickler's mother said those were Henderson' pants but she is the only witness who could say (inaudible). And yet we have a clean pair of pants here that Donna Tudor says are his pants, had blood on them and his mother washed them. It would have been nice if they could have been analyzed before they were washed but they weren't recovered in time. She [832] said we went there and there is an old car back there and he put stuff in the car. No, no, he told her to put stuff in a bag and they put it in the car. And what stuff did they put in the car? These ID cards, they put those in. Put a map of Virginia Beach in the car which shows they did go to Virginia Beach, that substantiates her story. And they put a black T-shirt in the car. The Harrisonburg police went out there and they recovered this bag and sure enough everything was there that the girl said there was including this T-shirt. This T-shirt is important. It is

important because of Ms. Stolzfus and the testimony of Donna Tudor. Donna Tudor said he was wearing this T-shirt that night when he picked her up. And what did Ms. Stolzfus say he was wearing? Blue jeans, a coat and a grey T-shirt with Harley Davidson on it. Just like this T-shirt here. And what is so important about this? He was wearing, we were able to get it before it was washed and sure enough there is human blood on it. That connects him to the murder too. That backs up what Ms. Tudor was telling us. In addition when she got picked up, she talked to the police, gave them a statement and said hey he gave me some things and sure enough one of the things that he [833] gave her was Leanne's earrings. They aren't damaged, evidently she was made to take them off before her head was smashed in with this rock and who has them, once again this man over here. And what else is there at the scene? You have a young woman, nineteen years old, she was kidnapped, she was taken out there. She was either forcibly made to disrobe or they disrobed her themselves. The blouse and bra were thrown down on the ground. Was forced to take off her watch or it was taken off for her. Her earrings were removed and she was placed on the ground. Ladies and gentlemen I submit to you there is no way one man could have done this crime. This is not a small rock that you can pick up and hold somebody down and just keep (inaudible) in the head. If one man is going to pick this up, it is going to take two hands. What was Leanne doing the whole time this was going on? Was she just waiting there, laying there peacefully for the end to come? Or did somebody have to help hold her down so that her head could be bashed in? One or more people. The second and third blows, she was

unconscious. But there is no evidence at all that she was unconscious on the first blow. This is not just a small rock here. Take it to the juryroom, lift it [834] yourselves, sixty-nine pounds, four ounces (inaudible) of solid rock. Based on his statements, he took part in this beating and killing. His own hair, well I won't say, that's not right. The experts said that the hair found on the bra and the shirt was alike in all characteristics as this man's here. There was no difference. And this hair had been torn out too. When? When she was struggling with him. Ladies and gentlemen I submit to you that the evidence is sufficient for you to find that the defendant is guilty of capital murder. If you believe the testimony of Donna Tudor along with this other evidence, the other evidence backs up her testimony. Now, how does the defense attempt to impeach Donna Tudor? Well they made a last ditch effort, desperate effort by putting Jay Tudor on the stand. He was a very credible witness. He testified that he and Donna are split up. She said she was living with another man. She said that, he said, he said, Jay Tudor said back in March she came to his home or his parent's home, Junior Knight's home out in Craigsville, Augusta Springs, and that while there she told him that she was with the two men that night. He also said that the girl had gone down here to Staunton, [835] picked Donna Tudor up and that she and the girl then went back to Harrisonburg and picked up the two men in the car and then later on they went out to this corn field where Henderson killed the girl with his fist and his, the rock, while she and Strickler stayed in the car. That is absolutely unbelievable with the evidence that you have. First off the evidence positively

shows that Leanne Whitlock did not come down to Staunton and pick up Donna Tudor. There is no evidence they even knew each other. The evidence positively shows that Donna Tudor and Leanne Whitlock did not go back to Harrisonburg and pick up these two men. We have got an eyewitness to what happened, that is just unbelievable. The evidence shows that Donna Tudor could not have been the girl with them that night because she was at Dice's at eight o'clock while these men were still over there. And in addition, Jay Tudor took the stand and he testified to all of this and I asked him about his conversation with Sergeant Campbell yesterday. I asked him, well did you tell Sergeant Campbell how Henderson killed the girl? He said yeah I did. I said you told Sergeant Campbell he used his fists, didn't you? He said yeah, but it was a fist and the rock. He never mentioned that to Sergeant [836] Campbell. The first time he ever mentioned the rock was when he saw it here in front of him this morning. Absolutely unbelievable. I submit to you that Jay Tudor is just mad at his wife. He is mad that she split up with him and that she is living with another man. He is just trying to get her in trouble. If this is true why didn't he come forth in March or April or May and tell the police what she said? Why wait until the day of the trial to come in and tell this story? There is no evidence at all to support what he said. There is plenty of evidence to show that it is not true. So Donna Tudor's statement, I submit to you, is true. Now Mr. Ashby talked to her, who is the investigator for Mr. Bobbitt, and at some point evidently she told him that Tommy Strickler was saying these things in his sleep. Fine, fine, he had to know them though. He couldn't have known them unless he was there and was

helping take part in it. And his conversation between him and Henderson took place in the car when he was wide awake when they were laughing and joking about the rock crusher. That can't be disputed. Ladies and gentlemen you have to decide if this man is guilty of capital murder or first degree murder. Under Virginia law we have what we call [837] the Felony Murder Rule, which says if you commit a robbery or an abduction or a rape or anything like that with another man and during this robbery the other man kills somebody then you are guilty of first degree murder. So if you believe from the evidence that this man did not take part in killing Leanne Whitlock, then you should find him guilty of first degree murder. If you believe from the evidence that he did take part in killing Leanne Whitlock, then you should convict him of capital murder and that is as simple as that. It's one of those two things. The evidence shows that he was involved in this robbery and abduction so he cannot be found not guilty of either first degree or capital murder, it has to be one of the two. I submit to you the evidence is clear. He made statements about his involvement. The wound on his hand, the blood on his own shirt; all this shows that he was involved in this brutal and senseless killing. The next issue that you have to decide will be punishment. I ask you to find him guilty of capital murder. I ask you now to find him guilty of also robbery and abduction as charged in the indictment and instructions. If you convict him of capital murder, you will not decide at this point what his punishment shall be. [838] There will be other evidence presented before you decide whether or not he will get life in prison or the death penalty. If you convict him of robbery and abduction now

and first degree murder, then you have to impose the penalty that you feel is appropriate. Let's not talk about capital or first degree murder right now, let's deal with the robbery and abduction. What are the proper punishments for these? On the robbery charge you can sentence him any place from five years to, in the penitentiary to life in the penitentiary. On the abduction charge you can sentence him from (inaudible) years in the penitentiary to life in the penitentiary. Now let's go ahead and deal with first degree murder too. First degree murder, you can sentence him any place from twenty years to life in the penitentiary if you convict him of that and I suggest to you the evidence does not support that conviction. It supports capital murder though. If you do convict him of that, what punishment should be imposed? Ladies and gentlemen this was a brutal killing. Absolutely senseless, heinous in every detail. Leanne Whitlock, there is two photographs here. One which shows a happy, beautiful young woman as she looked before her death. And then the medical [839] examiner photo, which shows her face after she was killed. Now there is some, as he said, there is skin slippage here but this gives you an indication of how she looked. What is the proper punishment for somebody who does this to a young woman like this? You know, Leanne's only thought that day, the only thing that she can be blamed for is that she went to the Valley Mall at the wrong time. These two men wanted a car so bad. Mr. Strickler wanted a car so bad that he was willing to kidnap for it. He was willing to rob for it. He was willing to kill for it. Ladies and gentlemen there is only one proper punishment in this case. Justice demands that if you do find him guilty of robbery and abduction and first degree that you impose the maximum penalty on all three

charges. Life on abduction, life on robbery, life on first degree. This girl was kidnapped at six forty-five, six fifty. By eight o'clock he had murdered her. She was dead. For a hour to a hour and fifteen minutes this woman lived through hell. When they first kidnapped her, she didn't know who they were. She didn't know what they wanted. She didn't know whether they were going to kill her or not. Before that, Ms. Stolzfus said she was singing, she was a happy [840] young woman. And yet they put here through this. There is no excuse for it. There is no justification for what these two men did. There is no reason to show him any mercy in your sentencing. This woman was brutally kidnapped, brutally robbed, brutally murdered. I ask you to find him guilty now of robbery and abduction and I ask you to sentence him to life in the penitentiary on both of those charges. I ask you to also find him guilty of capital murder at this point and a sentencing hearing would be held at a later time. Ladies and gentlemen this is a long case and as I said this is an important case. You are this man's jury. But you are the jury for the Whitlock family too. Her mother and dad, her sister. You are the jury for the people of Augusta County. You are members of the citizens of August County. It is your duty to decide what somebody who does these types of crimes should be punished with. And I submit to you that it should be the maximum punishment. So I do ask you to find him guilty of capital murder, robbery and abduction. Go ahead and sentence him on the robbery and abduction charges to life in the penitentiary and the sentencing on the capital murder, we will deal with that at a later time. [841] Thank you.

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VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

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[841] JUDGE: Thank you Mr. Ervin. Mr. Bobbitt. Where are the instructions?

MR. ERVIN: Right here Judge.

MR. BOBBITT: Your Honor if it would please the Court. Ladies and gentlemen of the jury, we began the other day in the trial by asking all of you the questions that have to be asked in this type of a case, in the whole series of it and each one of you was asked if you would decide the case solely on the evidence that was heard, presented from the witness stand and each of you agreed that you would do that. In a few minutes it is going to be your function to decide the case based on the evidence you heard and the key question in this case as Mr. Ervin has indicated, is that you will have to decide what the evidence proves about Mr. Strickler's participation in the murder that took place in this case. Now you have received the instruction on capital murder and I want to go over that. I know Mr. Ervin read part of it. The capital murder instruction lists the elements that are part of that offense, that have to be proved to establish that offense. And the first element, the first thing that is listed is that the [842] defendant killed Leanne Whitlock. That's the first and primary element of the capital murder charge, the instruction. There is another instruction which defines that element a little bit. It says that the Court instructs the jury that the evidence must establish beyond

a reasonable doubt that the defendant actually caused the death of Leanne Whitlock, before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. And Mr. Ervin has also gone over that entire instruction with you and you will have these back with you so that you can go over them yourself. I want to review with you now, some of the evidence, particularly in regard as how it, what it shows about Mr. Strickler's participation in the murder. The evidence shows that two men and a girl were at the mall. Ms. Stolzfus said she saw these people there and she met him and that she saw them abduct Leanne Whitlock. They come and beat on the car, got in the car and drove off in it. A little bit later there was a man that said that he saw the car coming down 340 and there appeared to be four [843] people in the car as it turned in this lane that he was familiar with. He saw just three people at that time and it is not explained as to why there were four people and then three people but perhaps the person in the back had pulled down somebody. He said the person in the back and their arms sort of up in a funny manner. But he says that he identified Mr. Strickler as being the driver of the car and that there was a girl, a white girl, who was in the passenger seat next to him. The evidence clearly establishes that the murder took place in that field where the car turned down. That that is where Leanne Whitlock was killed. There are holes in the ground there. There is blood in the holes in the ground, there was hair and there is a rock and there is blood on the rock and the body was found there and there is the medical testimony,

the evidence that the blows, that type of wound, the fractured skull. That there was instantaneous death and that, it's clear that that is where Leanne Whitlock was killed. The next real direct evidence we have is Henderson and Strickler were seen about nine that night at Dice's Inn. Several of the girls testified, said that they saw them there that night. They saw them leave with Donna Tudor that night. Donna [844] Tudor went with them. The next witness in the sequence of events for that night is that the witness, Mr. Workman, said that Henderson came to his house about four or five o'clock that night. Came in, appeared agitated, was rubbing the blood on his blue jeans and he said I've killed somebody. I didn't want to do it but I had to kill someone. The evidence is that shortly after that Mr. Strickler and Donna Tudor leave, leave Henderson there, go, they end up going to Virginia Beach. They are at Virginia Beach for about a week and they get back, shortly after they get back here, the car breaks down and the car is left at the church and Mr. Strickler and Donna Tudor are arrested. When they are arrested there are items in their possession, of course they are connected to the automobile, the automobile that Leanne, Strickler had. There are credit cards, earrings, Donna Tudor had the earrings. There are personal belongings that were in Leanee Whitlock's possession, that are in their possession after they are arrested here in Augusta County. Now all of that shows pretty clearly and without much dispute as Mr. Ervin indicated, that there was a robbery and that there was an abduction and that a murder took place. But it doesn't prove who [845] killed Leanne Whitlock. And there is additional evidence that I want to get in to now that tends to go to that point. A

part of that is that later on things were found at this sight where the body was ultimately discovered. The first thing that was found was Henderson's wallet with his identification in it. The next thing that was found was a shirt and bra that was sent to the lab. There was, there was the lab analysis and the experts who testified said that they were hairs that came off of the shirt and bra. They never testified as to whether the hair came from the shirt or the bra. It was all submitted as one package and there is no evidence as to what, where the hairs came from. Just that hairs were removed from the shirt and bra that were sent were identified, were consistent or similar to the hairs, to Mr. Stricker's hair. The man said that that is not a positive personal identification but they are consistent with Mr. Strickler's hair. There is also no evidence as to whose shirt and bra that was. There was never any evidence that was Leanne Whitlock's shirt or her bra. The only evidence is that this piece, items were found there at the scene just like Henderson's wallet was found there at the scene. And that these [846] hairs came from somewhere on them. We don't know whether it is the shirt or the bra but they came from somewhere on them. And I would submit to you that the evidence as I said clearly shows that an abduction took place and that there was a struggle during the course of the abduction and it's, if this was Leanne Whitlock's shirt, it's conceivable that the hairs that were on there got there during the course of the abduction. We just don't know that, we don't. And that point we have to speculate about as to when they got there and what the significance of it is. We can speculate about all of the evidence that comes from the scene itself. Were there two people there, were there three people

there? The security guard at, that testified first from Valley Mall said that she saw Henderson and Strickler walking around and that there was, she never saw any woman, never saw a female with them. But Ms. Stolzfus was definite, was positive that there was a woman and she described her. Said she was referred to as Donna. Said that they said this is Donna or Sharon. We can speculate about what the people that were there were doing. If there were three, what were two doing and what, who was doing what? Was one person turning the car around while the others [847] were doing something with Ms. Whitlock or, but we just don't know from the physical evidence and from the, from what was submitted, we don't know what was taking place. We have to guess and we have to speculate about what happened. You've been given the instructions and it says suspicion or probability is given, probability of guilt is not enough for a conviction. In other words, it is not enough to say that Mr., Mr. Strickler was probably doing this or he probably had a part in it or it was very suspicious. It has to be proved beyond a reasonable doubt that he actually was the person who killed Leanne Whitlock before you can find him guilty of capital murder. And there is evidence that points to, to Henderson. He was identified at the mall, he jumped in the car, he apparently was in the back seat. The man that was there was in the back seat. The woman was in the front seat. There is a white woman. So there is evidence that, that Henderson was sitting in the back seat and there is an inference that that's where Leanne Whitlock was at that time when they turned in the lane. Henderson's billfold was found in the field so he was definitely there. Henderson had blood on

his pants. Now there are several people that have testified that there has [848] been blood on his pants. Workman said that he was rubbing the blood spot on his pants when he was there in his apartment. The lab report says that the pants that Henderson took off at, at Ms. Silvious's house had blood on them. That's an indication that he was there. And on top of all of that he made the statement, that I have already referred to, that he had, that very night that he had killed someone. So there is evidence that certainly points to him. There is also evidence that points to, to Mr. Strickler. There is the testimony of Donna Tudor but I would submit to you that her testimony is just not credible. First of all, she has made a deal with the police. She has been charged in this. She came back, she was arrested, she was in the car, she had, she had the earrings on and so she says I will make the deal, I will tell you what you want to know if you will just let me off, get me out of this charge and she said that was what the agreement was. In fact, even so, the Commonwealth wasn't, didn't trust her enough to, to believe that she would be in Court so they had her put in jail a couple days before the trial so that she would be here for her to testify. That's how reliable she is. On top of that was the testimony of her estranged husband, [849] Jay Tudor, and I really, I don't know what you need to make of that or not make of it but anyway he says that she, she made the statement to him that she actually was there at the place. Maybe she made a statement or maybe she didn't make a statement to him. She said that she was there at the house but she denied making the statement. But there is some evidence indicating that she could have been there. There was several witnesses that say there,

there was this woman, this woman seems to fit Donna Tudor's description. The name of Donna was used. It's certainly possible that she was there and if that is the case, she at this point isn't going to acknowledge it. And if she is there, she is certainly able to tell the police what they want to know. She also, what she says isn't clear. She is very vague about what she says. She says, she said they said something about "it". She wasn't really, we don't know whether that refers to the incident with Leanne Whitlock or does that refer to something else because it is ambiguous. What does "it" mean when she is referring to it. She keeps using the word in her testimony. She always says they said this. She never says who did what, she just says they were whispering and I couldn't really hear [850] them and they said something but I really couldn't hear it. So her testimony is very vague. Mr. Ervin tried to get her to say certain things that indicated that, that she had heard Strickler say something but she really never said. She said all I heard was this whispering that they were saying that something had happened and I overheard something about a rock crusher and they said these things and she never really explained what that meant. Now she did, she said, she also said that there was blood on Mr. Strickler's pants. But she is the only witness who said anything about that. There was, the witnesses that the Commonwealth called from Dice's Inn. They were all asked how Strickler was dressed that night. And one of them said he was dressed very nice. His pants were a little dirty but nothing out of the ordinary. She didn't say anything about any blood on the pants and she had indicated she observed them. The, Mr. Strickler's mother who of course is a biased witness, she is his mother,

testified that she washed the laundry and that there wasn't any blood on the pants, on Mr. Strickler's pants when she washed them. But in addition to that, the lab technician said that there is a test that can be done to determine if blood is present even after [851] the clothes have been washed and we ran that test and that didn't show that there was any blood present. So there, so there's no evidence except for Donna Tudor's statement that she, and she is saying that this was a week afterwards when the clothes were washed. There was blood on there. But nobody who saw Mr. Strickler that night or the next morning said anything about that. In fact the ones that were asked directly said they didn't see any blood. There is, there is the black shirt that has been put into evidence and that was shown to all the witnesses. Some of them said they identified it, some of them said they didn't. One of the girls at Dice's, well she, Mr. Ervin said is this the shirt that Strickler had on and she said no that's not the shirt. Ms. Stolzfus said I can't say that's the shirt he had on. So there is some connection, I mean there is some confusion as to whether that is the shirt Mr. Strickler actually had on that night. The only thing that we know about it is that that is the shirt that came back from Virginia Beach because that is the shirt that was there in the car. Donna Tudor said it came back from Virginia Beach because she said she put it there in the car. There were stains on that, some body fluids, semen and blood. If [852] Strickler and Donna Tudor had been together for the whole seek and the shirt gets back there, we don't know where those stains came from or how they got there and there is no, there is no evidence to say that those things are identifiable with, with Leanne Whitlock

or that they in anyway originated from the night that the murder took place. So there is really no connection between that black shirt and the murder itself. It is just a piece of evidence that came in a week or so later. I've already referred to the, to the hairs on the shirt and bra and that's a piece of evidence that connects Mr. Strickler to the scene. It was found there at the scene, it had his hair on it. But what does it mean? The meaning of it is not clear because there was this abduction. There is no evidence as to where the shirt and bra came from or where the hairs came from off of there. Conceivably it could be the (inaudible) of the other woman that was, that was present. We just don't know that. So the significance of that is not clear. And it certainly doesn't prove that Tommy Strickler was involved in the murder other than he was there. And I'm saying involved, I mean he was the actual, the perpetrator of the murder. What there isn't is, there isn't evidence [853] to show that he, that Tommy Strickler was right there around the murder scene. There were fingerprint and footprints introduced in the evidence to show that Tommy Strickler was in the car but there wasn't any evidence of that sort, no footprints, no fingerprints to show that he was right around where the rock was and that he was right around where these holes in the ground were or that he was around where the body was. There is nothing of that sort to show that he was right there where the murder took place. There is, there are no, there is nothing, no hair or anything of Leanne Whitlock that was on his clothes that would show that, that he was in close contact with her. There are no eyewitnesses. And of course, there wouldn't be. But in sometimes they are. I mean in some cases of a murder there are

witnesses and certainly that, that helps prove things. For instance, in this case, in the abduction, there is an eyewitness, there are eyewitnesses, so compare the way you feel about the certainty you feel that Tommy Strickler got in the car and took the car, to the uncertainty you feel about what happened at the sight of the murder and that is the sort of judgment you need to make. You need to be certain. You need to [854] believe beyond a reasonable doubt that he was the actual perpetrator. The person who committed the actual murder, before you can find him guilty of capital murder. Now I want to go over with you briefly the first degree murder instruction. That instruction lists the elements also and the elements of that offense are that Leanne Whitlock was killed. That the killing was malicious. That the killing occurred in the commission of a robbery, rape or abduction. That the defendant was a participate [sic] in the commission of this robbery, rape or abduction. That the defendant or another participate [sic] in the commission of this robbery, rape or abduction killed Leanne Whitlock. So that certainly seems to fit the situation in every one of those elements. Whereas on the other hand, the capital murder instruction, you have to speculate. You have to guess as to, to reach the elements of that offense. And there is also the instruction that if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of a lesser offense. If you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. So that, [855] that tells you that you, if you have a doubt, if you have a question, you have to resolve that doubt with the lesser

offense. In this case, the Commonwealth has not established who did the actual killing. They have got theories about somebody had to be doing this or maybe two people would have had to pick up the rock or maybe somebody would have had to hold the person down. But those are just theories, there is nothing in the evidence to support that. They haven't established who delivered the blows to the head of Leanne Whitlock that actually killed her. You would have to go outside the evidence to say that Tommy Strickler did it. You would have to speculate that he was there doing something that there is no evidence that he was doing. And you are not suppose to go outside of the evidence. I would ask you in this case to return a verdict of guilty of first degree murder and not guilty of capital murder. Thank you.

JUDGE: Thank you Mr. Bobbitt. Mr. Ervin.

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VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

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[855] MR. ERVIN: May it please the Court. Ladies and gentlemen Mr. Bobbitt is an excellent defense lawyer. He has been in the business a long time and he does like many defense lawyers [856] do. You try to get the jury to just look at one detail at a time. Look at Donna Tudor's statement, not look at the other evidence all at one time. What you have to do in this case, is you have to consider all the evidence together. You can't look at one piece in a vacuum. You have to look at it all together to determine this man's guilt or innocence. He read you an instruction dealing with the crime of capital murder and he read you the first paragraph of that instruction. He did not go into the second paragraph because that is the paragraph that gets his man convicted of capital murder. This instruction is the one that I read before and I am going to read it one more time because this is the whole case right here. The first paragraph states, the Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock before you can find him guilty of capital murder. One who is present, aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. The second paragraph which Mr. Bobbitt did not read to you states, you may find the defendant [857] guilty of capital murder if

the evidence establishes that the defendant jointly participated in the fatal beating. If it is established beyond a reasonable doubt that the defendant was a active and immediate participant in the act or acts that caused the victim's death. That is what this whole case is about. This is not a case of one man killing Leanne Whitlock. This is a case of two men acting jointly to kill Leanne and that's what the whole case is about and that is what the defense tried to divert your attention away from. The Commonwealth agrees with Mr. Bobbitt on one point. Mr. Henderson killed Leanne Whitlock, just as this man did. They both acted jointly that is what the evidence, the bloody coat, the pants, the statement he made to his friend that he had killed a nigger that night. Mr. Henderson is guilty. I submit to you, so is this man. Just because Mr. Henderson is guilty doesn't mean that this man is not if they jointly cooperated in killing her, they are both guilty of capital murder. Now Mr. Bobbitt made a big deal about the bra and the (inaudible). He said nobody positively identified these as the one Leanne was wearing. That's true but what did Sonja Lamb and Beth Rogers say? They both said that Leanne [858] Whitlock was wearing a creme colored blouse when she left. Well I submit to you that matches the description of what Leanne was wearing. We can't say this is her blouse. Just as tomorrow you may not be able to say the person beside you was wearing a blue shirt and that this is the blue shirt. All they can do is describe it. This is Leanne's blouse I submit to you. There is no question about that. It was found right there within thirty to thirty-five yards of her body. No question about that. Mr. Bobbitt says Tudor is not believable. Donna Kay Tudor is not believable. That maybe she was

there and that is how she knew what to say. The evidence don't justify that. She was at Dice's Inn at eight o'clock while these two men were still over on Route 340. The evidence doesn't show that. And if she was there, she would be more specific about what happened. She wouldn't say they said something about a rock crusher. If she was there she would have said the rock crushed her. She was just repeating what she heard from these two men. And Mr. Bobbitt said well Strickler, Strickler, the defendant never said anything himself, it was just the two of them talking. That's not true. Donna Kay Tudor said that she asked him about the [859] cut on his hand. He said he got in a fight with a nigger.

MR. BOBBITT: Your Honor I will object to that because the evidence was not, he did not say that in the testimony. I have a transcript of what he said and he did not say that in response to, I mean she did not say, Donna Tudor did not say that in response to that question.

JUDGE: Gentlemen I am going to let each one of you argue what your recollection of this evidence is and the jury's recollection is the one that matters of what she said or what she didn't say.

MR. ERVIN: O.K., I'll withdraw that. As the Judge told you what you remember is what is important. Not the way I remember, not the way Mr. Bobbitt remembers, it is what you remember. I suggest to you, submit to you that she asked him about the cut on his hand. At some point he said he had a fight with "it". She asked him what "it" was and at some point he said "it" was a nigger. Now Mr. Bobbitt said that she had said that he said that he did anything to it. But remember she said, I

suggest to you, he said that he kicked "it" in the head. I asked her well how did he know to kick "it" in the head? He knew karate. [860] How does she know that unless he told her? And then "it" is not going to cause me anymore trouble. Ladies and gentlemen I submit to you those statements go to incriminate the defendant. In addition, it is true nobody at Dice's saw the defendant's hands with blood on them. But they were dirty, they had dirt on them. The witnesses said that his hands had dirt on them. Where did they get the dirt from? Down that road as he was killing Leanne Whitlock. This car, when it was stolen was clean. There was no dirt on it. Look at how it looks now with the mud all over it and the witnesses said that is how it looked that night at Dice's, had mud and dirt all over it. And he had mud and dirt on his pants because he was out there in the mud and dirt helping kill Leanne Whitlock. And there was no evidence there at the scene, no footprints. It was the middle of winter. No footprints were recovered. But the police recovered everything that was there. Everything that was there was analyzed. The police in this case, the Harrisonburg Police Department and Augusta County Sheriff's Department did a fantastic job on this investigation and that is the only reason the defendant was caught and charged with this crime. Ladies and gentlemen the [861] fact that this man had a cut on his hand, he had dirt on his hands, he was in the possession of the earrings that the dead girl was wearing that night. His statements to Donna Tudor, the black shirt. Now Mr. Bobbitt said Ms. Stolzfus didn't identify the black shirt. She is right. She cannot say positively this is it but she said it was a grey T-shirt with Harley Davidson insignia on it and that is what you have. And this

was recovered not from Henderson, not from anybody else in the case, this was recovered from the place that this man had put it, out in a car in a bag with the stolen property belonging to Leanne Whitlock. I submit to you that when you look at all the evidence, there is evidence to show that these two men jointly, not independently, but jointly killed Leanne Whitlock. You are able to look at all the evidence. You can make all reasonable inferences from the evidence that was there. Look at the rock. Feel this rock, feel how heavy it is. Look at the facts before you. I submit to you that one man could not have killed Leanne Whitlock that night the way she was killed. With this rock being thrown down on her head three times, crushing her skull in four different places so that her brain tissue penetrated out. There [862] was no way, I submit to you, that one man could have done that. Ladies and gentlemen I do ask you to find the defendant guilty of capital murder. Mr. Bobbitt by his closing arguments said that the evidence shows first degree murder. It does show first degree murder but it shows more. It shows capital murder and it shows robbery and it shows abduction. And those are the charges, I submit to you, that this man should be convicted of. Thank you.

JUDGE: Members of the jury the case is now with you. It is time for you to retire to your juryroom and reach your verdicts. Your first duty in this case, from this point on will be to select a Foreman. After you have arrived at an unanimous verdict on each charge, your verdict will be reduced to writing and signed by your Foreman. Now for each of the three charges we have, I have prepared for you an alternate form verdict which I think, no matter what your verdict is on any of these

charges, you will have (inaudible) forms ready for you. Now members of the jury it is twelve o'clock, we have been stopping for lunch right around one o'clock. If you all would like to go to lunch now before you start to deliberate, we can do that. If you want

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VIRGINIA: IN THE CIRCUIT COURT OF
THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

VERDICT

We, the jury, find the defendant guilty of Capital Murder, as charged in the indictment and as defined in Instruction No. 1.

/s/ John Emil Illegible
Foreman

DATE: 6-21-90

We, the jury, find the defendant not guilty of Capital Murder, but guilty of Murder in the First Degree, as charged in the indictment, and fix his punishment at _____.

/s/ _____
Foreman

DATE: _____

We, the jury, find the defendant not guilty of either Capital Murder or Murder in the First Degree.

/s/ _____
Foreman

DATE: _____

VERDICT

We, the jury, find the defendant guilty of Robbery, as charged in the indictment, and fix his punishment at Confinement in the penitentiary for life

/s/ John Emil Illegible
Foreman

DATE: 6-21-90

We, the jury, find the defendant not guilty of Robbery.

/s/ _____
Foreman

DATE: _____

VERDICT

We, the jury, find the defendant guilty of Abduction, as charged in the indictment, and fix his punishment at Life confined to the State Penitentiary

/s/ John Emil Illegible
Foreman

DATE: 6-21-90

We, the jury, find the defendant not guilty of Abduction.

/s/ _____
Foreman

DATE: _____

VIRGINIA: IN THE CIRCUIT COURT OF
THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

INSTRUCTION # 1

The Defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed Leanne Whitlock; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the abovp [sic] elements of the offense as charged, then you shall find the defendant guilty of capital murder.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more or [sic] the elements of the offense, then you shall find the defendant not guilty of capital murder.

6/21/90
Illegible
7HW

VIRGINIA: IN THE CIRCUIT COURT OF
AUGUSTA COUNTY

TOMMY DAVID STRICKLER

v.

COMMONWEALTH OF VIRGINIA

ORDER ASSIGNING COUNSEL TO
PURSUE HABEAS CORPUS REMEDIES

It appearing to the Court that the defendant, Tommy David Strickler, has been tried and convicted in this Court on the following felony charges: Abduction, Robbery and Capital Murder.

And now comes the defendant, and makes known to the Court his intention of pursuing his *habeas corpus* remedies on the above charges, and requests the appointment of counsel to pursue said *habeas corpus*.

It is, therefore, ORDERED that Victor M. Santos and Katherine Carruth Link, discreet and competent attorneys at law practicing before the bar of this Court, be, and they hereby are, appointed co-counsel for the said Tommy David Strickler to pursue his *habeas corpus* remedies, with no duplication of services to be done by co-counsel.

It is further ORDERED that certified copies of this Order be mailed to all counsel.

ENTER:

/s/ Illegible
Judge

Date: December 5, 1991

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,
Petitioner

v.

EDWARD W. MURRAY,
Director
Virginia Department of Corrections
6900 Atmore Drive
Richmond, Virginia 23225,

CHARLES THOMPSON,
Warden
Mecklenburg Correctional Center
Highway 386 – South
Boydton, Virginia 23917,

and

THE COMMONWEALTH OF VIRGINIA,
Respondents

PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

RECEIVED
SEP. 1, 1992

Comes now the Petitioner, Tommy David Strickler, by counsel, and files this Petition for a Writ of Habeas Corpus Ad Subjiciendum, pursuant to the authority of Section 8.01-654 of the Code of Virginia (1950) as amended. Petitioner is incarcerated and is being held by the Virginia Department Corrections under two sentences of life imprisonment and a sentence of death entered by the Circuit Court of Augusta County. Petitioner's convictions and his sentence of death violate the Constitution of

the United States, the Constitution of Virginia, and other applicable statutes. Petitioner respectfully requests an evidentiary hearing and adjudication of the issues raised herein.

* * *

GROUNDS OF UNLAWFUL DETENTION

I. Ineffective Assistance of Counsel

Defense counsel failed to provide effective assistance of counsel to Petitioner during the pre-trial proceedings, at the trial during which guilt was determined, during the sentencing hearing, and on appeal to the Supreme Court of Virginia and the United States Supreme Court, in violation of rights guaranteed to him by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and article I, sections 8, 9 and 11 of the Virginia Constitution, as follows:

1. Counsel failed to move for a change of venue or venire as the result of adverse publicity concerning the case and the defendant. Counsel failed to make any pretrial motion with respect to a change of venue or venire based on newspaper articles, radio broadcasts and television broadcasts. Counsel further failed to move for a change of venue or venire when voir dire disclosed that almost every venireman had been exposed to news coverage of the disappearance of the victim, the recovery of the body, and the arrest of the defendant. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

2. Counsel failed to file a motion under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, to have the Commonwealth disclose to the defense all exculpatory

evidence known to it-or in its possession. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

3. Counsel failed to conduct competent voir dire of the members of the venire by virtue of counsel's failure to inquire about the racial attitudes of the prospective jurors. The victim was black, and the defendant was white. Counsel should have inquired into the possibility that members of the venire would be inclined to impose the death sentence as the result of the venire members' attitudes about atoning for racism of whites and past oppression of blacks. U.S. Const. amend. V, VI, VIII, XIV Va. Const., art. I, sect. 8, 9, 11.

* * *

38. Counsel failed effectively to cross-examine Anne Stolzfus and failed to impeach her credibility. (See Exhibit 2) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

39. Counsel failed effectively to cross-examine Donna Tudor and failed to impeach her credibility. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

40. Counsel failed effectively to cross-examine David Oxley, the medical examiner, by failing to elicit from him testimony that it was possible (1) that all four head wounds were inflicted by one blow, (2) that, if there were three blows as he believed there were, all three were necessary to kill the victim, (3) that the victim was unconscious as the result of other traumas before any blow to the head. Each of these possibilities would have had a bearing on the jury's ultimate finding of vileness. (See

Exhibit 3) U.S. Conts. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

41. Counsel failed to cross-examine Dianna Willeman and to show the inconclusive nature of the blood, saliva, and semen comparisons for purposes of linking the defendant to the commission of the murder or any sexual assault on the victim. (See Exhibits 4 & 5) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

42. Counsel failed to cross-examine Michael Grim and to show the inconclusive nature of the fingerprint comparisons for purposes of linkage the defendant to the commission of the murder. (See Exhibit 6) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

43. Counsel failed to cross-examine Myron Scholberg and to show the inconclusive nature of the hair comparisons for purposes of placing the defendant at the scene or linking him to commission of the crimes charged. (See Exhibits 7 & 8) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

44. Counsel failed to object to admission into evidence of the certificates of forensic analyses, Exhibits 37, 38, 39, and 41, on the basis of the Commonwealth's failure to file the certificates with the clerk of the court at least seven days prior to the hearing or trial, as required by Section 19.2-187 of the Code of Virginia (1950) as amended. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

45. Counsel failed to move for a continuance until such time as Henderson could be apprehended and specimens taken for analysis. Such analysis, performed after Henderson's arrest, would have demonstrated that it was possible that Henderson, not Strickler, was the perpetrator of the murder and of any sexual assault that may have occurred. (See Exhibits 5 & 8) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

46. Counsel failed to object to the improper expression of opinion by the medical examiner as to the body of the victim having been dragged by its feet on its face. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

* * *

21. Defendant's conviction for capital murder and sentence to death are the result of the arbitrary and capricious application of the Virginia capital murder statute to defendant. The giving of Instruction No. 1 and Instruction No. AA and the refusal of Instruction No. A and Instruction No. B resulted in a conviction of capital murder and imposition of the death sentence, whereas a second defendant charged with the same offenses who had the benefit of instructions on the so-called "triggerman" rule was convicted of first-degree murder and sentenced to life imprisonment. The giving of different instructions to two defendants charged with the same crime and tried upon substantially the same evidence is a unconstitutionally arbitrary and capricious application of the capital murder statute. U.S. Const. amend. V, VI, VIII, XIV, Va. Const., art. I, sect. 8, 9, 11.

22. The giving of Instruction No. 1 resulted in an unconstitutional application of the Virginia capital murder statute to defendant. Instruction No. 1 contained language which allowed the jury to base a conviction of capital murder on a underlying offense not allowed by Section 18.2-31 of the Code of Virginia (1950) as amended. One of the elements of the offense set forth in this instruction was

> (3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.

But Code Section 18.2-31 does not include abduction with intent to defile in the definition of capital murder except with reference to a victim under the age of 12 years. The jury was allowed to base its finding of guilt of capital murder on predicate offense not found in the statute.

The error of inclusion of the language "or with the intent to defile" is not harmless. There are no findings of the jury which allow a conclusion to be drawn that the jury found the other underlying offenses which were also possible bases for a finding of guilt.

The first alternative, a killing during the commission of robbery while the defendant was armed with a deadly weapon, has not been established. The jury found the defendant guilty of robbery "as charged in the indictment." (R. 126) The indictment did not charge defendant with robbery while armed with a deadly weapon. Instead, it charged him with robbery "by violence to the

person or by assault or by putting the said Leanne Whitlock in fear of serious bodily harm." No finding was made by the jury that defendant was guilty of robbery while armed with a deadly weapon. Thus, the verdict of guilt as to robbery does not establish the underlying offense of robbery while armed with a deadly weapon.

The second alternative, a killing during the commission of abduction with the intent to extort money or a pecuniary benefit has not been established. The jury found defendant guilty of abduction "as charged in the indictment." (R. 127) The indictment for the offense of abduction was expressed in the disjunctive – the jury could find either intent to extort money or other benefit *or* intent to defile and return a guilty verdict. The verdict did not state which of these was found or whether both were found. Because there is no means of determining from the record if the jury found defendant guilty of abduction with intent to extort money or other pecuniary benefit, this underlying offense has not been established as the basis of the capital murder conviction.

The inclusion of an underlying offense which is not in the capital murder statute undermines the jury's verdict. A verdict based on conduct not defined as capital murder is constitutionally impermissible. Moreover, the prejudicial effect of inclusion of the language not in the statute is so great that it requires that the verdict of guilt as to capital murder be vacated. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

* * *

B. That the court command the respondent to bring petitioner before the court at a time and place specified,

and that the court take such action on this petition as is appropriate.

C. That the court grant petitioner an evidentiary and plenary hearing on this petition and accord to him the right to present testimony and documentary evidence, as well as argument of counsel.

D. That the court set aside petitioner's convictions and sentences because of the violation of his rights under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and the corresponding provisions of the Virginia Constitution.

E. That the court grant to petitioner such other relief as his case may require.

/s/ Tommy D. Strickler
TOMMY DAVID STRICKLER

Nelson, McPherson, Summers & Santos

By: /s/ Victor M. Santos
Victor M. Santos

/s/ Katherine Carruth Link
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12 N. New Street
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(7)

No. 98-5864

Supreme Court, U.S.
FILED
DEC 10 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

TOMMY DAVID STRICKLER,

Petitioner,

vs.

FRED W. GREENE, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 212 TO 435

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Certiorari Granted October 5, 1998

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VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. Case No. CL 92000305

EDWARD W. MURRAY, et al.

Respondents.

MOTION TO DISMISS

Now come the respondents, by counsel, and move this Court to deny and dismiss the petition for writ of habeas corpus.

* * *

Claim 2

The petitioner next claims that counsel were ineffective for failing to file a motion for exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.[4]

From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed *all* the evidence the Commonwealth intended to present. Both attorneys were taken together to the crime scene, accompanied by the two prosecutors and the chief investigator, and shown the

---

[4] Counsel did file a Motion for a Bill of Particulars, parts of which were denied on the grounds that the material requested was actually "discovery." (Tr. 7-8, 14, 18-21).

location of the evidence found there. No evidence was introduced at trial of which the petitioner's counsel had been previously unaware. (See Resp. Exh. 1, ¶ 3). Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.

In addition, counsel could have made a tactical decision not to file such a motion, because it would have made reciprocal discovery available to the Commonwealth under Rule 3A:11(c) of the Rules of the Supreme Court of Virginia. Counsel thus would have been required to disclose any highly prejudicial information then known to them, *e.g.*, the report of Dr. Warren. (See Resp. Exh. 6). Because the decision to forego a formal discovery motion could have been the result of reasonable trial strategy, the petitioner cannot show ineffectiveness under *Strickland*, 466 U.S. at 689; *Darden*, 477 U.S. at 186. Nor, when counsel in fact obtained all the information to which they were entitled under *Brady*, can he show prejudice. This claim must therefore be denied and dismissed.

* * *

Claims 38 - 43

In these six claims. Strickler alleges that counsel ineffectively handled certain of the Commonwealth's witnesses. Specifically, he maintains that counsel:

(a) failed to effectively cross-examine Anne Stolzfus to impeach her credibility (Tr. 494-506) **(Claim 38)**;

(b) failed to effectively cross-examine Donna Tudor to impeach her credibility (Tr. 577-584) **(Claim 39)**;

(c) failed to effectively cross-examine Dr. Oxley, the medical examiner, to elicit from him that it was possible that (1) all four head wounds were inflicted by one blow; (2) if there had been three blows to the head, as he believed, all three were necessary to kill the victim; and (3) the victim was unconscious as the result of other traumas before any blow to the head (Tr. 614-615) **(Claim 40)**;

(d) failed to cross-examine Dianna Wileman, the forensic serologist, to show the inconclusive nature of the blood, saliva, and semen comparisons linking the petitioner to the murder and sexual assault (Tr. 720) **(Claim 41)**;

(e) failed to cross-examine Michael Grim, the fingerprint expert, to show the inconclusive nature of the fingerprint comparisons linking the petitioner to the murder (Tr. 730) **(Claim 42)**;

(f) failed to cross-examine Myron Scholberg, the hair and fiber expert, to show the inconclusive nature of the hair comparisons which placed the petitioner at the murder scene and linked him to the crimes. (Tr. 759) **(Claim 43)**.

In support of each of these claims, the petitioner offers only the record of the cross-examination of these same witnesses at the subsequent trial of his co-defendant, Ronald Henderson. It is meaningless to compare the efforts of different counsel in different trials where the same witnesses testify. If, as the United States Supreme

Court has acknowledged, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, certainly those same attorneys would not defend *different* clients in the same way. The petitioner cannot at all presume that one attorney was "more effective" when his client is found just as guilty. Henderson was convicted of murder, abduction and robbery, and the jury imposed the maximum sentence for each of those charges. (See Resp. Exh. 3). It is clear from this that his counsel's cross-examination of these witnesses did nothing to weaken their credibility or create any doubt in the juror's minds as to his guilt, as Strickler seems to claim.[7]

In *Anderson v. Peyton*, 209 Va. at 805, 167 S.E.2d at 116, the Virginia Supreme Court held that counsel was not ineffective for failing to pursue a different course of action where it was "by no means certain" that the result would have been different. Here, it *is* certain, by the very evidence the petitioner offers in support of these claims, that the result would *not* have been different. Manifestly, then, there can be no prejudice under *Strickland*, and these claims fail.

* * *

[7] Henderson's conviction for first degree, rather than capital murder, arose from instructions defining "triggerman" given by the trial court in his case which the Virginia Supreme Court has since ruled are legally erroneous. Compare Instructions C, D and E (Resp. Exh. 4), and *Strickler*, 241 Va. at 493-495.

Claim 68

In this claim, the petitioner alleges that counsel were ineffective for failing to object to Instruction 1 because it described a form of abduction, "with the intent to defile", which is not a predicate for capital murder under § 18.2-31.

The capital murder indictment against Strickler charged that he "did unlawfully, feloniously, willfully, deliberately and with premeditation kill and murder Leanne Whitlock during the commission of robbery, rape or abduction with the intent to extort money or a pecuniary benefit." (R. 1). Two other indictments charged that he did "unlawfully and feloniously rob Leanne Whitlock of a motor vehicle or other personal property by violence to the person or by assault or by putting the said Leanne Whitlock in fear of serious bodily harm" (robbery) (R.2), and that he "did unlawfully and feloniously abduct Leanne Whitlock with the intent to extort money or other pecuniary benefit or to defile Leanne Whitlock" (abduction). (R. 1).

The jury was instructed as follows:

Instruction 1

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) that the defendant killed Leanne Whitlock; and

(2) That the killing was willful, deliberate and premeditated; and

(3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile, or was of a person during the commission of, or subsequent to, rape.

(R. 100). The jury was also instructed that

The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intended to steal; and

(2) That a motor vehicle or other personal property was taken; and

(3) That the taking was from Leanne Whitlock or in her presence; and

(4) That the taking was against the will of the owner or possessor; and

(5) That the taking was accomplished by violence to the person or threat of serious bodily harm.

* * *

A "deadly weapon" is any object or instrument that is likely to cause death or great bodily injury because of the manner, and under the circumstances, in which it is used.

* * *

The defendant is charged with the crime of abduction. Kidnapping and abduction are the same crime. The Commonwealth must prove

beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant by force or intimidation did seize, take, transport, detain, or hide Leanne Whitlock; and

(2) That the defendant did so with the intent to obtain money or other benefit of value or with the intent to defile Leanne Whitlock; and

(3) That the defendant acted without legal justification or excuse.

(R. 107, 102, 108). The jury convicted Strickler of "capital murder as charged in the indictment and as defined in Instruction 1," robbery "as charged in the indictment," and abduction "as charged in the indictment." (Tr. 869). At sentencing, the court reaffirmed convictions of capital murder, robbery, and "abduction with intent to defile." (9/19/90 Tr. 25-26).

While abduction with the intent to defile is not one of the predicate felonies for capital murder pursuant to § 18.2-31, the language of the jury instruction was not prejudicial. Here, the jury unanimously found beyond a reasonable doubt that Strickler was guilty of robbery while armed with a deadly weapon. That is one of the predicate felonies for capital murder, *see* § 18.2-31(4), and was specifically enumerated in his capital murder indictment. Thus, there can be no question that he was found guilty beyond a reasonable doubt of capital murder in the commission of robbery while armed with a deadly weapon.

The United States Supreme Court has ruled that "the issue in a collateral proceeding is 'whether the ailing

instruction by itself so infected the entire trial that the resulting conviction violates due process.' " *Stokes v. Warden*, 226 Va. at 119, 306 S.E.2d at 886, *quoting Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The "total context of the events at trial" must be evaluated in making such a determination. *United States v. Frady*, 456 U.S. 152, 169 (1982), *quoted in Stokes*, 226 Va. at 119, 306 S.E.2d at 886.

There can be no question that the murder was willful, deliberate and premeditated, given that the victim was alive when the fatal wounds were inflicted and that the evidence of her struggle was Strickler indicated that she had to be held down while she was killed. In addition, Strickler drove Leanne's car after the murder, gave the earrings she was wearing when she was abducted to Donna Tudor, and attempted to use Leanne's credit cards in Virginia Beach after the murder.

It is clear from this that Strickler's convictions for capital murder and armed robbery were both legally correct and proven beyond a reasonable doubt. Rape is also a predicate for capital murder and the evidence showed that a rape had occurred. The erroneous inclusion of "intent to defile" language in the capital murder instruction does not change this. Consequently, Strickler can show no actual prejudice. The Virginia Supreme Court reached the same conclusion in *Stokes*. There, an instruction which presumed that a defendant intended the natural and probable consequences of his acts was given in a murder trial, several months after the United States Supreme Court, in *Sandstrom v. Montana*, 442 U.S. 510 (1979), had ruled such burden-shifting instructions impermissible. In spite of that, however, the Court in *Stokes* denied his petition for a writ of habeas corpus

because it found that, where the evidence of his premeditation was overwhelming, he could not show actual prejudice, 226 Va. at 119, 306 S.E.2d at 886. The same reasoning and conclusion necessarily applies here. Given the jury's unanimous conclusion that Strickler was guilty of robbery, there is no reasonable probability that the jury would not have convicted him of capital murder if it had not received the erroneous instruction that abduction with intent to defile was a possible predicate for a capital murder conviction.

* * *

For all the foregoing reasons, Strickler's petition for a writ of habeas corpus should be denied and dismissed without an evidentiary hearing.

Respectfully submitted,

EDWARD W. MURRAY, et al.,

By /s/ H. Elizabeth Shaffer
Counsel

H. Elizabeth Shaffer
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219
(804) 786-4624

CERTIFICATE OF SERVICE

I certify that on the 12th day of November, 1992, a copy of the foregoing Motion to Dismiss was hand-delivered to Victor M. Santos, Esquire and Katherine Carruth Link, Esquire, 12 North New Street, P. O. Box 1287, Staunton, VA 24401.

/s/ H. Elizabeth Shaffer
H. Elizabeth Shaffer
Assistant Attorney General

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

No. CL 92000305

v.

EDWARD W. MURRAY, et al.

Respondents.

AFFIDAVIT

STATE OF VIRGINIA,

CIT [sic] OF STAUNTON, to wit:

The affiants, William E. Bobbitt, Jr., and Thomas E. Roberts being duly sworn, state as follows:

1. We are William E. Bobbitt, Jr., and Thomas E. Roberts. We represented Tommy Strickler at his 1990 jury trial in Augusta County for capital murder, abduction and robbery. We base our statements in this Affidavit on our personal knowledge and investigation of this case. (Except where otherwise indicated by the context, "we" and "our" should be construed to refer to the defense team and not necessarily both defense attorneys).

2. One of us (Bobbitt) has been practicing law since 1969 and has been the full-time Public Defender for the region consisting of Augusta and Rockbridge Counties and the cities of Staunton, Waynesboro and Buena Vista since 1974, in which capacity he has devoted 100% of his practice to criminal defense work. He has defended three other defendants on capital murder charges, one of which

resulted in a capital murder conviction and a death sentence.

The other (Roberts) has been practicing law since 1976, and was hired by Bobbitt as part-time Assistant Public Defender in 1989, to which he has devoted approximately 50% of his practice. In the twelve years prior to this, he devoted approximately 50% of his practice to criminal defense work, both retained and court appointed, excluding the one year (1983-1984) during which he was a full-time student at Harvard University. We both had extensive experience trying felony jury cases, and worked together extremely well during the investigation and trial of Strickler's case.

3. We thoroughly investigated Strickler's case, both as to the facts surrounding the offense, and the potential aggravating and mitigating evidence that could be presented at a penalty stage proceeding if Strickler were convicted of capital murder. In this we were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files, and were driven by them to the crime scene with their investigators, where they pointed out to us where each item of evidence had been found at that site. As a result of this cooperation, they introduced nothing at trial of which we were previously unaware.

JURY SELECTION

4. Prior to trial, we obtained and carefully reviewed the list of prospective jurors, including their addresses and occupations, and also reviewed a list of jurors from

that term of court to determine who had previous jury experience. From these lists, we were also able to talk with people we knew who knew some of the prospective jurors.

5. We arranged for Strickler to be appointed co-counsel in hopes that he could address the jury without being subject to cross-examination. However, we also consulted with him during jury selection and sought his suggestions and impressions concerning the venire. We concluded that a highly intelligent jury might be more favorable to him because it might be more open-minded, and not be distracted by the gruesome nature of the crime. We also thought that a more intelligent jury would better understand the "triggerman" issue and be able to apply it to what we thought might be evidence which was confusing or muddled at points, because we fully expected Judge Wood to grant an "actual perpetrator" instruction rather than the one given. The questions we asked any given juror were based on our combined professional judgment as well as input and preference from the defendant as to how best to determine whether a juror was impartial or would be favorable or unfavorable to the defense. If a prospective juror's answers gave us any doubt about his or her impartiality, we either challenged the juror for cause or followed up with additional questions until the additional answers, in our judgment, removed any doubt or until we believed the answers justified a challenge for cause. Those questions were also designed to secure the most intelligent jury possible.

6. Because we were dealing with an interracial crime in a rural area, we discussed in advance whether to question the jurors about their specific racial attitudes to

determine racial bias. Interracial crimes in our area are relatively rare, and we were uncertain what effect race questions would have on the venire. We decided not to ask such questions because we did not want to emphasize that the victim was black and the defendant white. In our best professional judgment, we were concerned that we might alienate the jury by implying that they were biased, or might inadvertently suggest that the death penalty was appropriate because the crime was interracial.

7. Augusta County has a large Mennonite population, and for that reason, we also discussed whether to question the venire about their specific religious affiliation and its effect on their beliefs about the death penalty. Exercising our best professional judgment, we decided to forego such questions because we could not comfortably determine whether they would help or hurt the defendant. Although we knew that the Mennonite Church is a "peace church," and as such is opposed to capital punishment, we also knew more modern Mennonites whose beliefs deviated from that position. Furthermore, we also realized that any Mennonite who did adhere to his church's stedfast [sic] opposition would warrant a challenge for cause, so that even a response to such questions which helped Strickler would not have yielded a jury more favorable to him.

8. We made a strategic decision not to further object when the court rephrased our question regarding predisposition to the death penalty to "how do you feel about the death penalty," because we believed that the permitted question would reveal any pre-existing bias, and we

did not want to risk alienating the court at the start of a long and stressful trial without good reason.

9. We decided not to question the venire about their ability to consider and weigh any mitigating evidence because, in our judgment, the mitigation evidence available to us was neither strong nor persuasive. We did not want to be perceived as having implicitly made promises to the jury by suggesting the possibility of such evidence when we knew we would not be able to produce it.

10. Ms. Hickox appeared open and fair in the way she answered voir dire questions, and for that reason, we decided not to strike her.

11. In voir-diring Mr. Scheufel, we gave serious consideration to his previous law-enforcement ties. However, we knew that he had no had direct experience in serious criminal investigations, and thought from his demeanor and answers that he was intelligent and would judge fairly. We chose not to strike him for that reason.

12. It was also clear to us that Dr. Painter satisfied our "intelligent juror" criterion. We were convinced from his answers that nothing he had read or heard about the case would prejudice him against Strickler. In addition, he appeared open-minded and fair as he answered questions about the death penalty, and for that reason, we chose not to challenge or strike him.

13. Venireman Joyce appeared to be very open-minded in stating that he would consider both alternatives of life and death, and we were impressed by his demeanor. In our judgment, he was a fair man, and we wanted him on the jury for that reason.

PRE-TRIAL MATTERS

14. On January 25, 1990, Bobbitt, his investigator, Thomas Ashby, and Strickler's attorney on his Harrisonburg charges attended a line-up at the Augusta County Sheriff's officer [sic] shown to Kurt Massie. All the observers saw a group of six men. Strickler had blond and bushy hair; all the others had either blond hair or bushy hair. Strickler has a very distinctive appearance, and would probably stand out in any group of men, no matter how similar in appearance. I (Bobbitt) thought that this was probably as fair an assemblage of men with characteristics similiar [sic] to Strickler as possible, and I thought it was fairer than a photospread would have been. In my best professional judgment, the line-up was not legally unfair, and for that reason, I did not feel there was any basis to object, nor did Strickler's Harrisonburg attorney, because she neither commented on it to me or said anything to anyone else about it. I did challenge Massie's identification in court, but his testimony only revealed what I already knew from having been at the line-up: there was nothing impermissibly suggestive in the identification procedure. For these reasons, I made no further objections to the line-up or to Massie's identification of Strickler.

15. As we prepared for trial, Ronald Henderson was still at large, and we determined that it was emphatically in our client's best interest that his trial occur before Henderson was apprehended. Although we were aware of Henderson's statement to Kenneth Workman by the time Strickler's trial began and planned to use Workman as our witness, we were very concerned that when Henderson was caught, he would admit being present at the

murder but claim that Strickler, not he, had actually dropped the rock and killed Leanne Whitlock. We were equally concerned that specimens taken from Henderson, once subject to analysis, might definitively eliminate him as the perpetrator and equally definitively confirm Strickler as the perpetrator, not only of the murder, but possibly of the rape as well, thereby subjecting him to another felony charge which is a predicate for capital murder.

OPENING STATEMENT

16. As a general rule, we each avoid making frequent or repeated objections during the prosecutor's opening statement, because often it alienates the jury and prejudices them against our client. Here, we decided to use any overstatements by the prosecutor to our advantage in closing arguement [sic], by emphasizing to the jury that the evidence he had produced had fallen short of what he had earlier promised. For that reason, we kept silent about his discussion of Donna Tudor's testimony and of the "excellent police investigation." By the time the prosecutor began to describe the sentencing phase of the trial, we could see that the jury had been visibly moved by his opening statement and was ready to be angry with us and the defendant for any reason. Consequently, we did not object to the sentencing phase discussion. We also felt that any objection to Ervin's statement about doing justice for the victim and her family would have had the same negative result for Strickler.

GUILT PHASE TESTIMONY AND EVIDENCE

17. Well before trial we had seen Commonwealth's Exhibit 18, which was a picture of the logs and debris concealing Leanne's body. Once we had seen the field in which her body was found, it was obvious to us also that those logs had intentionally been placed together to hide her corpse. Moreover, their condition was an insignificant issue in the case. We chose not to object when Detective Hoover testified about the condition of the logs because we saw nothing to be gained from objecting to so minimal a matter and did not want to tax the jury's good will be doing so.

18. Before trial we had seen all the physical evidence that the Commonwealth planned to introduce and we determined that the chain of custody had been properly maintained on each item. Because our strategy was to create doubt that Strickler had actually killed Leanne Whitlock, evidence of other people's presence at the crime scene and involvement in the crime would be beneficial to Strickler, and we wanted all of it before the jury. Consequently, we would have undermined our own strategy if we had successfully objected to the physical evidence seized at the scene and later from Donna Tudor and Mr. and Mrs. Silvious' home (Claims 58-64). Furthermore, chain of custody objections can be very technical in nature and their import is often lost on a jury. We did not want to confuse or alienate the jury by making technical objections on issues whose significance might elude them.

19. We had contacted Harry B. Dice, III, before trial and had subpoenaed him to testify for Strickler. However,

just before he was to take the stand, we asked our investigator, Tom Ashby, to review Dice's testimony with him. He came to us and told us that part of what Dice would say included him seeing the defendant use his knife to fix a gold chain after the murder while Strickler was at Dice's Inn. Fearing that the mention of a knife in his possession so shortly after the murder would be very damaging and would help the Commonwealth prove that Strickler had in fact been armed earlier that evening, and would far outweigh any possible benefit from Dice's testimony, we chose to forego his testimony.

GUILT PHASE INSTRUCTIONS AND ARGUMENT

20. We offered Instruction E as an alternative to the Commonwealth's proposed Instruction 10. Their instruction stated that "[e]xtort means to obtain something of value from a person by force," while "E" stated that "[e]xtort means to compel someone to part with something of value." Because robbery requires the use of force or violence, their proposed instruction did not draw the necessary distinction between robbery and extortion, as an element of abduction for pecuniary benefit. Without that distinction, the jury might erroneously convict Strickler of abduction when the evidence only showed robbery. We hoped the jury would conclude that, with extortion as a necessary element of abduction, there was insufficient evidence to prove the abduction, which would have eliminated one of the predicate crimes for capital murder. The more doubt we could create about Strickler's commission of the underlying felonies, the better the chance that he would not be convicted of

capital murder at all. (We also thought there was slight evidence that he was armed when he robbed Leanne).

21. When, during closing argument, the prosecutor told the jury that they were the jury for the Whitlock family also, we chose not to object in order to avoid further emphasizing the remark. In our best professional judgment, we did not consider it a particularly inflammatory remark, and we did not want to risk alienating the jury at such a crucial time for our client.

22. Our strategy in closing argument was to stress the total lack of direct evidence that Strickler had actually murdered Leanne. Over our strenuous objection, the court had already granted the "joint triggerman" instruction. We felt that the evidence clearly established the abduction and robbery, and the physical and forensic also evidence clearly established Strickler's presence at the murder scene. Because the evidence also showed Henderson was present, our best professional judgment told us that our only real hope lay in creating so much doubt about who actually killed Leanne that the jury would not want to risk sending the wrong man to the electric chair, and thus would convict only of first degree murder. We strongly felt that to deny that any crime had even been committed would have destroyed our credibility with the jury and along with it, any hope of sparing Strickler's life.

SENTENCING PHASE

23. Well before trial, we spoke at length with Strickler in search of mitigation evidence. Either we personally or Thomas Ashby, our full-time investigator,

spoke with everyone we could find, either because Strickler referred us to them or because those to whom Strickler referred us gave us their names. This included his mother and sisters, neighbors who had known him when he was growing up, and people with whom he had worked. With the exception of the witnesses we actually called, everyone we contacted had negative and unfavorable things to say about him. Many said they always knew he would get into trouble. Even some of his family members told us that if he had murdered Leanne, then he deserved to die for it.

We were thoroughly familiar with the violence and hostility in Strickler's childhood environment, both from talking with his family and from Janet Warren's report. But we were equally aware that he had frequently and violently struck back. This was particularly clear in Dr. Warren's report, and would have been extremely damaging to him at the sentencing phase on the issue of future dangerousness. Any attempt to bring the home violence issue before the jury through Dr. Warren would have subjected her to vigorous cross-examination about Strickler's own violent propensities. For that reason, we felt that the most favorable and sympathetic, and least damaging, testimony, should come in through his mother and sisters.

All of the choices we made regarding which witnesses to present and which not to present were the result of our combined professional judgment and trial strategy based upon our own investigation and upon all the information Strickler had given to us. Our goal at all times

was to present to the jury a picture of Strickler which was as favorable and as sympathetic as possible.

/s/ William E. Bobbitt, Jr.
Affiant

Sworn and subscribed to before me, a Notary Public, in and for the City and State aforesaid on this 6th day of November, 1992.

/s/ Linda H. Major
Notary Public

My commission expires:

June 11, 1993

/s/ Thomas E. Roberts
Affiant

Sworn and subscribed to before me, a Notary Public, in and for the City and State aforesaid on this 6th day of November, 1992.

My commission expires:

/s/ Linda H. Major,
Notary Public

June 11, 1993

VIRGINIA: IN THE CIRCUIT COURT OF
AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner

v. CASE NO.: CL 92000305

EDWARD W. MURRAY, et al,

Respondents

MOTION FOR FUNDS FOR INVESTIGATOR

Comes now the Petitioner, by counsel, and states as follows:

1. That Petitioner has filed a Petition for Writ of Habeas Corpus Ad Subjiciendum which is pending in this court.

2. That Respondents have filed a Motion to Dismiss said Petition. The basis for the Motion to Dismiss with respect to many counts of the Petition is that no evidence has been proffered to demonstrate prejudice resulting from various allegations of ineffective assistance of trial counsel.

3. That in order to procure the necessary factual basis to support certain of Petitioner's claims, investigatory work is necessary that cannot adequately be performed by habeas counsel alone.

4. That habeas counsel is aware of potential witnesses with respect to certain of Petitioner's claims.

5. That, if habeas counsel alone questions all witnesses, such counsel risks becoming a witness for

impeachment purposes and having to withdraw as counsel in the event a witness gives a contradictory account of events when summoned for trial.

6. That habeas counsel is in need of the assistance of an investigator to research the extent and nature of media coverage of the events leading to the trial of Petitioner's charges.

7. That habeas counsel is in need of the assistance of an investigator to question certain potential witnesses and to be available to testify, by affidavit or in person, at a hearing with respect to the claims raised by Petitioner.

8. That Petitioner is without funds or resources and is not capable of paying for the assistance of an investigator.

9. Section 14.1-183 of the Code of Virginia (1950) as amended, allows an indigent person to sue or defend a suit without paying fees or costs, and further allows such person to be provided with all "needful services" in connection with the case. Investigative services are necessary in the prosecution of this habeas corpus petition. The Commonwealth of Virginia has provided for payment of expenses incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner. *See* Appropriations Act, item 26(3) (1993 Va. Acts of Assembly Ch. 994)

10. Under United States Supreme Court decisions, a death sentence is unconstitutional unless the defendant has been provided "meaningful access" to the post-conviction review process. *See Murray v. Giarratano,* 492 U.S.

1 (1989). Without access to investigative services, Petitioner will be denied meaningful access to review of his conviction and death sentence.

WHEREFORE, Petitioner respectfully requests this court to enter an order allowing counsel for Petitioner to hire at state expense an investigator for the purposes of (1) assisting habeas counsel in the investigation of the facts supporting Petitioner's claims, (2) reporting to habeas counsel his findings, (3) submitting an affidavit as to facts supporting Petitioner's claims, and (4) if necessary, testifying at any hearing granted with respect to the Petition.

Respectfully submitted,

TOMMY DAVID STRICKLER

By Counsel

Nelson, McPherson, Summers & Santos

By: /s/ Victor M. Santos
Victor M. Santos

and

/s/ Katherine Carruth Link
Katherine Carruth Link
12 N. New Street
P. O. Box 1287
Staunton, Virginia 24402-1287

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Funds for Investigator was mailed to H. Elizabeth Shaffer, Assistant Attorney General, Counsel for Respondents, Supreme Court Building, 101 N. Eighth Street, Richmond, Virginia 23219, this 13th day of May, 1993.

/s/ Katherine Carruth Link
Katherine Carruth Link

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. RECORD NO. CL 92000305

EDWARD W. MURRAY, *et al*,

Respondents.

RESPONSE TO MOTIONS FOR FUNDS FOR: EXPERT WITNESS, INVESTIGATOR, EVALUATION OF PSYCHOLOGICAL TEST RESULTS, AND MITIGATION EXPERT.

Come now the Respondents, by counsel, and in response to Petitioner's Motions for Funds for: Expert Witness, Investigator, Evaluation of Psychological Test Results, and for Mitigation Expert, state as follows:

1. On November 4, 1991, the United States Supreme Court denied certiorari on Petitioner's direct appeal. *See Strickler v. Virginia*, ___ U.S. ___, 112 S. Ct. 386 (1991). On August 27, 1992, nine and a half months later, Strickler filed a Petition for Writ of Habeas Corpus, raising 139 separate claims. Petitioner filed his Petition without the use of any of the experts he now requests. Having filed his Petition unassisted, *a fortiori* he cannot now establish the need of experts.

2. None of Petitioner's claims raise issues of fact. (See Motion to Dismiss). The record itself reveals that all his allegations only address matters of law for which no evidentiary hearing, and therefore necessarily no experts, are warranted.

3. The "meaningful access" in a death penalty case to which Petitioner refers does not even create a constitutional right to the assistance of counsel in state habeas proceedings. *See Murray v. Giarratano*, 492 U.S. 1, 12 (1988); *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2566 (1991). To the contrary, in *Giarratano*, the United States Supreme Court ruled that states have "wide discretion" in selecting appropriate options for post-conviction proceedings, and specifically held that Virginia's scheme, which did not *require* appointment of counsel (although it routinely does provide counsel), did not violate the Constitution. *Giarratano*, 492 U.S. at 14. That decision was based on the principle that "[S]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Id.*, 492 U.S. at 10. "A post conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a *presumptively valid criminal judgment*. Nothing in the Constitution requires the State to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings." *Id.*, 492 U.S. at 13 (O'Connor, J., concurring).

Consequently, where appointment of counsel is not required in capital habeas proceedings, and where Virginia courts have consistently denied capital defendants the appointment of experts at the trial stage, when Constitutional rights are at issue, *see e.g., O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 484 U.S. 871 (1988) (forensic scientists); *Townes v. Commonwealth*, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987),

cert. denied, 485 U.S 971 (1988) (identification expert); *Gray v. Commonwealth*, 233 Va. 313, 330, 356 S.E.2d 157, 166, *cert. denied*, 484 U.S. 873 (1987) (investigator), it necessarily follows that Petitioner has no right to any of the experts he requests for this state habeas proceeding.

4. Nothing in Virginia law or in the Appropriations Act authorizes the appointment of the experts Petitioner requests. Virginia Code § 14.1-183 states:

> Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefore, except what may be included in the costs recovered from the opposite party.

Paragraph 25(3), 1991 Virginia Acts 723, provides, "the *state's share of expenses* incident to the prosecution of a petition for a writ of habeas corpus by an indigent petitioner" shall be paid from amounts designated for pre-trial, trial, and appellate processes. (emphasis added). Since under § 14.1-183 the state's share of expenses pertains only to counsel fees, service of process fees, and court costs, the General Assembly did not intend to authorize the payment of *all* expenses incident to a habeas petition.

EXPERT WITNESS FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

6. Even in this court were to grant an evidentiary hearing on Petitioner's ineffective assistance of counsel claims, under *Strickland v. Washington*, 466 U.S. 668 (1984), there would be no basis for the appointment of an expert witness "to evaluate trial counsel's performance and testify as to whether trial counsel's [sic] performance rose to the level of effective assistance of counsel." (Motion, p. 2). As *Strickland* recognizes, "[E]ven the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. Because the practice of law is an art as well as a science, and no two attorneys can be exactly alike in the practice of the profession, it is basically unreasonable to judge one attorney by what another, with the benefit of hindsight, says he might or would have done. *Williams v. Beto*, 354 F.2nd 689, 706 (5th Cir. 1965). Hindsight by a non-participant can always be used to cast doubt on actual trial tactics used. *Reynolds v. Mabry*, 574 F.2d 978, 979 n.3 (8th Cir.1978).

Under *Strickland*, however, judicial scrutiny of counsel's performance must be "highly deferential," must "eliminate the distorting effects of hindsight" and must "reconstruct the circumstances of counsel's challenged conduct," so as to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. No expert is required to apply this standard for the trier of fact who also presided at trial.

7. In requesting an expert at this late date, Petitioner undermines his claims of ineffective assistance of

counsel. If counsels' performance violated both *Strickland* prongs as required, no expert would be needed to elucidate this fact for the court.

8. The function of a habeas proceeding is neither to retry the case nor to try trial counsel for their conduct. Petitioner has offered no authority, and has shown on basis, for his request for an expert to address counsels' effectiveness.

INVESTIGATOR TO ESTABLISH FACTUAL BASIS FOR CLAIMS

9. Strickler's Petition contains 139 separate habeas claims. By requesting appointment of an investigator "to procure the necessary factual basis to support certain of Petitioner's claims" (Motion, p. 1), Petitioner is implicitly conceding that he is not aware of factual support for the claims he has already made. Respondent agrees. (*See* Motion to Dismiss). It would appear, therefore, that this Motion has been filed only to delay resolution of these proceedings.

10. Where appointment of an investigator at the *trial* of a capital case is "an act of judicial grace not constitutionally required," *Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982), *cert. denied*, 460 U.S. 1029 (1983), all the more so is this true in this collateral proceeding. *See e.g., O'Dell*, 234 Va. at 686, 364 S.E.2d at 499; *Willis v. Zant*, 720 F.2d 1212, 1215, n.5 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) (failure of state to provide financial assistance for habeas proceeding states no constitutional issue).

11. Moreover, Strickler has not demonstrated any clear need for the investigator he requests. Speculation about "certain potential witnesses" or "the extent and nature of media coverage of the events" (Motion, p. 2) is totally insufficient. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 323-324, n.1 (1985) (generalized assertion of need for investigator insufficient *at trial*). There is no legal or factual basis for this request for an investigator.

EXPERT WITNESS TO EVALUATE PSYCHOLOGICAL TEST RESULTS

12. Strickler has cited no authority for his request for a psychological or neuropsychological expert, nor can he. Before trial, at his counsels' request, the court ordered psychological and neuropsychological examinations of the Petitioner. This habeas proceeding is not a relitigation of his guilt or innocence, nor it is a retrial of the factual issues underlying aggravation and mitigation evidence, or of the punishment the jury properly imposed.

13. Any alleged "deficiency" in the choice of tests given or in the evaluation of their results does not warrant the relief he seeks. Petitioner has not alleged that the experts appointed at trial were ineffective. Even such a claim is not cognizable in a habeas corpus proceeding. The United States Court of Appeals for the Fourth Circuit recently "rejected the notion that there is either a procedural of constitutional rule of ineffective assistance of an expert witness, rather than ineffective assistance of counsel." *Pruett v. Thompson*, ___ F.2d ___ (4th Cir., May 25, 1993) (No. CA-90-667, slip op. at 22, n.12). The Court explained:

> 'It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another. . . . To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require.'

Id., quoting Waye v. Murray, 884 F.2d 765, 767 (4th Cir.) (per curiam), *cert. denied*, 492 U.S. 936 (1989).

14. Manifestly, there is no provision in law for appointing such psychological experts at this state habeas proceeding. Petitioner has already filed his Petition, and was obligated to investigate all possible claims before he did so. Even if a right to psychological experts existed, his request would be now be [sic] too late.

MITIGATION EXPERT

15. Finally, Petitioner has cited no authority for his request for a "trained mitigation specialist" (Motion, p. 1), nor is there any. No right to a mitigation expert exists for a capital defendant even at trial. *See generally Quintana*, 224 Va. at 135, 295 S.E.2d at 646. All the less is he entitled to such an expert in this collateral proceeding. *See generally Giarratano*, 492 U.S. at 10.

16. It is clear from the trial record that mitigation investigation was done and that Petitioner was subjected to both psychological and neuropsychological examinations. (R. 5-7, 10-13). His speculative assertion of need based on "other mitigation evidence" which "could have

been discovered," (Motion, p. 1), is wholly insufficient to justify the relief he requests.

17. Having already filed his Petition, this after the fact request for an expert to which he is not entitled can only be interpreted as a further attempt to delay these proceedings. There is no basis in law or in fact for granting his request for this expert.

CONCLUSION

17. More than seven months have passed since Respondents filed their Motion to Dismiss this Petition. It was not until Respondents moved for entry of an Order dismissing the Petitioner that Petition filed these Motions. And Petitioner has yet to respond to the Motion to Dismiss.

WHEREFORE, Respondents respectfully ask this court to deny and dismiss Petitioner's Motions for Funds for an Expert Witness regarding claims of ineffective assistance of counsel, for Funds for an Investigator, for Funds for and Expert Witness to Evaluate Psychological Test Results, and for Funds for a Mitigation Expert.

In view of the total lack of response to the Motion to Dismiss, Respondents also ask this Court to set a date on which that Motion may be argued.

Respectfully submitted,
EDWARD W. MURRAY, *et al.*,

By: /s/ H. Elizabeth Shaffer
Counsel

STEPHEN D. ROSENTHAL
Attorney General of Virginia

H. ELIZABETH SHAFFER
Assistant Attorney General
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

On June 28, 1993, I mailed copies of this Response to Victor M. Santos, Esq., and Katherine Carruth Link, Esq., NELSON, MCPHERSON, SUMMERS & SANTOS, 12 N. New Street, Staunton, Virginia 24402-1287, counsel for the Petitioner.

/s/ H. Elizabeth Shaffer
H. Elizabeth Shaffer
Assistant Attorney General
Appellate Section

VIRGINIA: IN THE CIRCUIT COURT
OF AUGUST COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. NO. CL 92000305

EDWARD W. MURRAY, *et al*,

Respondents.

ORDER

Upon mature consideration of the petition for a writ of habeas corpus, the motion to dismiss of the respondent, a review of the record of the criminal cases of *Commonwealth of Virginia v. Thomas David Strickler*, which is hereby made part of the record in this matter, the Court finds, for the reasons stated in the Motion to Dismiss, that the petitioner is not entitled to the relief sought:

Pursuant to *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1990), claims previously adjudicated against a petitioner may not be relitigated in habeas corpus. Barred from consideration by the rule of *Hawks* are **Claim II, subparts 1-3, 5-9, 11, 14, 19 and 23.**

Pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), habeas corpus is unavailable for claims which could have been raised at trial and on appeal. Barred from consideration by the rule in *Parrigan* are **Claim II, subparts 4, 10, 12, 13, 16-18, 22, 25-32 and Claim III, subparts 1-9.**

In addition, **Claim II, subparts 15, 20, 21 and 24** are barred under both *Hawks* and *Parrigan*.

The Court also finds that none of the petitioner's allegations of ineffective assistance of counsel in **Claim I, subparts 1 through 96** meet the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

The Court further finds that the petitioner's allegations of newly discovered evidence raised in **Claim IV, subparts 1 and 2** are barred from review on habeas corpus.

The Court further finds that the petitioner's motions for appointment of experts: to evaluate ineffective assistance of counsel claims, to investigate factual bases for claims, to evaluate psychological test results, and to investigate possible mitigation evidence, are without merit.

The Court further finds that the petitioner's motion to disqualify it is without merit.

The Court finding no basis for relief, it is therefore **ADJUDGED and ORDERED** that this petition for a writ of habeas corpus is hereby **DENIED and DISMISSED**. It is further **ADJUDGED AND ORDERED** that all motions to appoint experts and/or investigators, as well as the motion to disqualify the judge, are hereby **DENIED and DISMISSED**, to which actions the petitioner's objections are noted.

It is further **ORDERED** that the clerk of this Court forward certified copies of this order to counsel of record.

Enter this 10 day of
September, 1993.

/s/ H. Wood
Judge

I ASK FOR THIS:

/s/ H. Elizabeth Shaffer
H. Elizabeth Shaffer
Counsel for Respondents

SEEN AND OBJECTED TO:
For Reasons Set Forth In Oral Argument

/s/ Katherine Carruth Link
Katherine Carruth Link
Counsel for Petitioner

/s/ Victor M. Santos
Victor M. Santos
Counsel for Petitioner

Daily News-Record
Harrisonburg, Va., Wednesday, July 18, 1990
Letters

THE TRAGEDY

As a witness to the abduction of Leann Whitlock, I agree with Rob Jordan that racial prejudice was a factor in her murder. We must do all that we can to break down our stereotypes and differences.

However, it was not lack of caring about human life and it was not lack of caring about Leann because she was black that led me to not call the police that Jan. 5 night. My concern was raised because of Strickler's repeatedly hitting her. My interpretation of her leaning on the horn and then mouthing "Help" was that she was responding to the violence. then as they drove away, the four of them seemed calm and Strickler was sitting close to Leann with his left arm up around her. This is what reassured me and made me believe that she was OK. It never occurred to me that I was witnessing an abduction.

In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture.

Would it have occurred to me that this was an abduction if those three characters were black and the beautiful, well-dressed girl were white? I don't think so. Would

those characters have murdered Leann if she had been white? Probably not. There lies the tragedy.

We all have an obligation to work toward peace. Being aware of our stereotypes and ignorance is only the first step.

Anne Stoltzfus
Harrisonburg

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	Civil Action No. 3:95cv924
v.	)	
J.D. NETHERLAND, Warden, Respondent.	)	

ORDER

(Filed Dec. 10, 1996)

The Court is in receipt of the respondent's motion to dismiss petitioner's habeas corpus petition. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court grants respondent's motion to dismiss with respect to claims B(10), C, E, G, H, I, K, L, M, O, P, Q, R, T, and V.

The Court grants an evidentiary hearing on the remainder of petitioner's claims.

Let the Clerk send copies of this Order to counsel of record.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DEC. 10, 1996
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	
v.	)	Civil Action No. 3:95CV924
J.D. NETHERLAND, WARDEN Respondent.	)	

MEMORANDUM

On September 19, 1990 the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254 Strickler filed a Petition for a Writ of Habeas Corpus and an Amended Petition for a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. This matter comes before the Court on Respondent's motion to dismiss Strickler's petition for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion has been fully briefed by the parties and is ripe for decision.

BACKGROUND

1. Procedural History:

On February 27, 1990 the Circuit Court of Augusta County, Virginia charged Strickler on one count of abduction and one count of robbery. On April 23, 1990 the court indicted him for capital murder. Strickler pleaded not guilty to all charges. Strickler was tried by a jury before the Circuit Court of Augusta County (J.Wood) and found guilty of capital murder, robbery and abduction. The jury sentenced him to two life sentences and to death on June 21, 1990, and the judge upheld the sentence in the sentencing hearing on September 19, 1990.

On April 19, 1991 the Virginia Supreme Court upheld Strickler's conviction and sentence in *Strickler v. Commonwealth*, 404 S.E.2d 227 (1991). The United States Supreme Court denied his petition for a writ of certiorari. Subsequently, Strickler filed a petition for a writ of habeas corpus in the Circuit Court of Augusta County. The court dismissed the petition in full without an evidentiary hearing on September 10, 1993. The Virginia Supreme Court granted certiorari with respect to limited issues, but denied the petition on January 13, 1995. *Strickler v. Netherland*, 452 S.E.2d 648 (1995). Strickler's petition for a writ of certiorari to the United States Supreme Court was denied on October 2, 1995. On March 5, 1996 Strickler filed his federal habeas corpus petition in this Court.

Factual Background

In affirming Strickler's conviction and sentence on direct appeal, the Virginia Supreme Court stated the facts of the case as follows:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne *486 dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.

Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.

As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push

him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[1] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back

[1] Leanne was black.

seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head-on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his blood-stained blue jeans and his shirt. Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car behind Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church.

Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs. Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground. Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as

well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots. Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human bloodstains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

DISCUSSION

The Applicability of the 1996 Antiterrorism and Effective Death Penalty Act

On April 24, 1996 while Strickler's petition was pending, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L.No. 104-132, 110 Stat.1214 ("the Act") became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101-106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28 U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to petitions in capital cases.

Respondent asserts that the Act, which amends and adds to pre-existing law governing habeas corpus review, should be applied retroactively in resolving the issues presented by Strickler's petition. Strickler argues that the law in effect at the time he filed the petition should govern. Before addressing the substance of Strickler's claims, it is, therefore necessary to determine whether, and to what extent, the Act applies to Strickler's petition.

Chapter 154, New Habeas Corpus Provisions:

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt in" procedures: 1)the "post-conviction" procedure provided by Section 226 1; or 2) the "unitary review" procedure provided by Section 2265. The substantive changes this chapter makes to the law currently governing federal habeas review are summarized by the district court in *Hill v. Butterworth:*

> If a state opts in to the new habeas provisions, it receives several procedural benefits. First, petitions for habeas relief under Section 2254 must be filed in federal court within 180 days 'after final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.' 28 U.S.C. § 2264(a). Second, federal district courts are limited to only considering 'a claim or claims that have been raised and decided on the merits in the State courts.' 28 U.S.C. § 2264. Third, adjudication of a petition subject to Chapter 154 must be given priority by the district court and court of appeals 'over all noncapital matters.' 28

> U.S.C. § 2266 (a). Fourth, reviewing courts are forced to expedite their review of habeas petitions brought under the Chapter 154. District courts must render a final judgment on a habeas petition within 180 days after the petition is filed, allowing the parties at least 120 of those days to brief the case and have a hearing on the merits. A court of appeals must hear and render a final determination of an appeal within 120 days after the reply brief is filed. 28 U.S.C. § 2266. Fifth, no amendment to a habeas petition subject to Chapter 154 is permitted after the filing of the answer to the petition, except on certain grounds set forth in § 2244(b). 28 U.S.C.§ 2266(b)(3)(B).

Hill v. Butterworth 1996 WL at *3 (N.D. Fla. Aug. 7, 1996).

The Fourth Circuit in *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996) requires this Court to analyze Strickler's petition under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." See § 107(c). But, the Court of Appeals explained that the new provisions only affect habeas petitions if "the state has established procedures to ensure the appointment of qualified counsel to represent indigent petitioners in state post-conviction proceedings." *Id.* at 1342. Since, Virginia does not have a unitary review procedure, the Court must analyze whether Virginia meets the post-conviction review procedures and thus qualifies as an opt in state.

To qualify as an opt in state a state specifically must meet all four of the following criteria:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b)

2. Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b)

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* § 2261(c)

4. Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* § 2261(c)

Has Virginia Satisfied the Opt-in Requirements

Since July 1, 1995 the appointment of counsel for post-conviction capital cases is required under the Va. Code § 19.2-163.7. Between July 1, 1992 and June 30, 1995, however, the appointment of counsel in the post-conviction process was made upon request by the petitioner. Va. Code § 19.2-163.7 (prior to 1995 amendment). The Fourth Circuit has not decided whether Virginia's post-conviction appointment provisions qualify it as an opt-in state. The Court of Appeals did not reach the issue in *Bennett v. Angelone* because Virginia's system of post-conviction appointment provisions was set up "after petitioner's

Virginia habeas petition had been finally denied by the Virginia Supreme Court." *Id.* at 1342. Here, however, Strickler's state habeas petition was filed and denied by the Supreme Court of Virginia after Virginia's 1992 post-conviction system was in place. Thus, the Court must examine whether the procedures in effect when Strickler filed his petition, September 1992, satisfy the opt-in requirements.[2]

Judge Payne of the Eastern District of Virginia considered the issue in *Satcher v. Netherland*, No. 3:95cv261 (E.D. Va. October 8, 1996). Judge Payne concluded that Virginia was not an opt-in state because it post-conviction counsel mechanisms in place between 1992 and 1995 failed to meet three of the four requirements laid out by § 107. The Court agrees with the *Satcher* holding that while Virginia substantially complied with the Act's requirement for the time period in question it failed to adhere to the strict formal requirements of the Act.

Only since July 1, 1995 has Virginia required by statute the appointment of competent counsel to represent

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[2] There is some dispute as to which date courts should consider when analyzing the opt-in provisions. The Fourth Circuit in dicta suggests that courts should look at the system in place when the Virginia Supreme Court denied the petition. 92 F.3d at 1342. The district court in *Wright v. Angelone*, however, looked at the provisions in place when petitioner's state counsel was appointed. No. 2:96cv830 (E.D. Va. Oct 15, 1996). Since the provisions lay out the appointment of counsel the district court's approach seems the most logical. Under either method, however, the result is the same. Since Respondent picks the time of filing the state petition, the Court will look at the provisions in place at that time.

indigent petitioners in its post-conviction proceedings. Before that time, counsel was appointed at *petitioner's request*. Section 107, however, requires a statutory appointment mechanism that places an affirmative and automatic duty upon the State to offer competent post-conviction counsel to all prisoners sentenced to death. The Commonwealth's system in effect when Strickler filed his petition did not place such an affirmative duty upon the state. Thus while no indigent capital defendants have gone unrepresented in Virginia state habeas proceedings, the Court finds that the statute fails to meet the formal requirement of the Act. See *Wright v. Angelone*, action no 2:96cv830.

Furthermore, the Va. code does not provide for the compensation and reimbursement litigation expenses for such counsel. While Virginia substantially complies with the law by the General Assembly's appropriations acts that provide for the payment of such counsel it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." *Bennett*, 92 F.3d at 1342 n.2. This same conclusion was reached by the court in *Satcher*.

As the court in *Satcher* noted, "if Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so." *Id.* Congress instead chose to confer the benefits only if states made a formal commitment to provide a post-conviction review system that protected

capital litigants' constitutional rights. *Id.* This Court agrees with this analysis and finds that Virginia's system for compensation and payment of expenses fails to meet the standards established by § 107.

Virginia does not qualify as an opt-in state because it fails to adhere to the formal requirements of § 2261. While it substantially complies with the Act's provisions, its statutory scheme does not establish the rigid standards for providing counsel to indigent defendants or compensating the counsel. Therefore, it can not enjoy the "benefits" provided by the § 2261 of the Act.

Chapter 153 Amendments

Respondent argues that the general habeas provisions contained in Chapter 153 of the Act, §§ 101-106 apply to Strickler's petition. These procedures effect a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Unlike Chapter 154, they are not made explicitly applicable to petitions pending when the Act took effect. Nonetheless, the Commonwealth urges the retroactive application of the Chapter 153 amendments to Strickler's petition. This Court, however, agrees with the *Satcher* analysis and finds that the Chapter 153 amendments do not apply retroactively.

The Supreme Court most recently addressed the question of retroactivity in *Landgraf v. USI Film Prods.*, ___ U.S. ___, 114 S.Ct. 1483 (1994). In *Landgraf*, the petitioner sought the application of a new statute (Title VII of the Civil Rights Act of 1991) to cases pending on the date the new law was enacted. The Supreme Court rejected that interpretation and reaffirmed the presumption against retrospective application of statutes. *Id.* at 1503. The

Court explained that retroactive application of legislation is disfavored because

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. at 1497. In *Landgraf* the Court determined that when faced with the retroactivity question, a court must first determine whether Congress "has expressly prescribed the statute's proper reach." *Id.* at 1505. In the absence of clear congressional intent, a court must determine whether a statute would have retroactive effect, "i.e. whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505. If the court finds such a retroactive effect, the traditional presumption "teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

After examining the language of the Chapter 153 amendments the Court finds that the Supreme Court's analysis in *Landgraf* prohibits retroactive application of the Act. The language of the Chapter 153 amendments contains no express provision of retroactivity. Congress, however, clearly considered the issue when drafting the Act. Section 107(c) of the Act states that "Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act." The Act, however, contains no similar provision for the Chapter 153 amendments. *See*

Bennett v. Angelone, 92 F.3d at 1342-43. Congress' failure to include similar language for the Chapter 153 amendments reflects its intent that these provisions are not to apply retroactively. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Both the Second and the Tenth Circuits have held that the Chapter 153 Amendments are not applicable to pending petitions. *See Boria v. Keane*, 90 F.3d 36, 38 (2nd Cir. 1996) ("While Congress has spoken clearly in some portions of the new statute with respect to the application of the statue to pending cases, see, e.g., § 107(c), in the context of non-capital habeas cases the statute's silence is striking. This silence coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."); *Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996).

The Court finds that provisions of Chapter 153 would definitely have a retroactive effect if applied to petitioner's case. Since Congress did not expressly state that they should be applied retroactively, the Court concludes that it must follow the traditional presumption against retroactive application. Thus the Court finds that neither the new Chapter 153 amendments nor the new Chapter 154 provisions apply to Strickler's petition. Therefore, the Court will analyze Strickler's claims based on the law governing federal habeas corpus review in effect at the time he filed his petition. *Strickler's Claims:*

In his federal habeas petition Strickler raises the following claims:

(A) Insufficiency of the evidence to support the verdict of capital murder

(B) Ineffective assistance of counsel

(C) Strickler did not receive the mental health expert assistance guaranteed by *Ake v. Oklahoma*

(D) Strickler's death sentence was arbitrary and capricious, and also disproportionate to the sentence received by his more culpable co-indictee

(E) Improper jury instructions violated Strickler's Sixth, Eighth, and Fourteenth Amendment rights.

(F) The trial court's failure to allow counsel to ask or inform jurors about parole

(G) The trial court erroneously limited voir dire about jurors' ability to show mercy and thus follow their oaths as jurors in considering a life sentence

(H) The trial judge's refusal to qualify jurors Almarode and Wills

(I) The trial judge's failure to excuse for cause jurors Ramsey and Brooks

(J) Strickler's rights under the Sixth, Eight and Fourteenth Amendments were violated when the commonwealth withheld exculpatory evidence

(K) The prosecutor knowingly presented false testimony at Strickler's capital murder trial

(L) Strickler was deprived of his rights to a fair trial and due process of law under the Sixth, Eight, and Fourteenth Amendments when the Commonwealth presented inconsistent testimony and argument on the evidence at the two trials

(M) Strickler is actually innocent of the crime and the sentence

(N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty

(O) Strickler's rights under the Sixth, Eight, and Fourteenth Amendments were deprived by prosecutor's improper comments in opening and closing arguments

(P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eight, and Fourteenth Amendments to the Constitution

(Q) The death penalty is cruel and unusual and therefore is unconstitutional

(R) Vileness and future dangerousness under the Virginia death penalty statue [sic] are unconstitutionally vague

(S) The evidence was insufficient to establish either future dangerousness or vileness

(T) Juror misconduct

(U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution

(V) Ineffective assistance of appellate counsel

The Commonwealth contends that most of Strickler's claims are procedurally barred and those that are not lack merit. As a preliminary matter the Commonwealth does not dispute that Strickler has exhausted his state remedies and his claims are thus properly before this Court.

A. Insufficiency of the evidence to support the verdict of capital murder

Strickler first claims that there was insufficient evidence to convict him of capital murder. Respondent concedes that there are no procedural difficulties with this claim. Under Virginia's triggerman statute, only the immediate perpetrator of a crime may be convicted of capital murder. A conviction based on circumstantial evidence regarding who did the actual killing must "exclude every reasonable hypothesis of innocence." *Rogers v. Commonwealth*, 410 S.E.2d 610, 627 (1991).

The Virginia Supreme Court found that there was sufficient evidence to convict Strickler of capital murder. Under § 2254(d) the state court's findings are presumed to be correct unless they fall under one of the listed eight factors. In this case the Virginia Supreme Court relied on misstatements of the record and thus lose [sic] their presumption of correctness under § 2254(d)(8). The state court improperly stated Donna Tudor's testimony about

the condition of Strickler's clothing and ignored testimony of other individuals at Dice's Inn who did not describe Strickler as wearing such stained clothing that night. The Supreme Court also misstated the forensic evidence. It ignored critical testimony about additional hairs near the victim which were not Strickler's; and the expert's inability to match the semen found in the victim's body with any individual.

The jury undoubtedly had sufficient evidence to conclude that Strickler was present at the crime. The question here, however, concerns the sufficiency of the evidence to support its determination that Strickler actually committed the killing and was not an observer or accomplice. While the Court believes the inquiry is not easy; it finds that Strickler is entitled to an evidentiary hearing on the claim and that it should not be dismissed.

B. Ineffective assistance of counsel

Petitioner claims that his trial counsel rendered him ineffective assistance of counsel both during the guilt and to sentencing phases. Petitioner enumerates many instances of purported ineffectiveness, some of which respondent claims are procedurally defaulted.

The standard for ineffective assistance of counsel is set up in *Strickland v. Washington*, 466 U.S. 668 (1983/4). In *Strickland*, the Court set up a two pronged inquiry to assess counsel's performance. In order to prove ineffective assistance, a petitioner must show that counsel's performance fell below minimum standards while overcoming a strong presumption towards reasonableness.

Not only do petitioners have to prove deficient performance, they must also show that counsel's errors prejudiced them. The Supreme Court defined prejudice as a reasonable probability that counsel's errors undermined confidence in the outcome of the trial.

Strickler raises numerous instances of ineffective assistance that he claims rise to the *Strickland* level. After reviewing his various allegations, the Court finds that this claim should not be dismissed and that Strickler should be granted an evidentiary hearing on the issue to resolve genuine issues of material facts. The failure of Strickler's counsel to pursue a voluntary intoxication defense is procedurally barred, but the other components of his claims pass the procedural hurdles. While some of counsel's alleged ineffectiveness do not by themselves rise to the Strickland level, when examined all together, they present a genuine issue of material fact as to whether counsel performed ineffectively.

C. Failure to provide effective assistance under *Ake v. Oklahoma*

In *Ake v. Oklahoma*, the Supreme Court held that a defendant in a capital case must have the assistance of a competent, effective and independent mental health expert. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Respondent correctly notes that Petitioner has procedurally defaulted on this claim because it was never raised on direct appeal. Petitioner claims that this claim is reviewable under *Sawyer v. Whitley*, 505 U.S. 333 (1992). Under *Sawyer*, a federal habeas petitioner may "pass through the gateway" and argue the merits of an otherwise defaulted

constitutional claim arising out of an error at sentencing if the petitioner can demonstrate by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law. *Id.* Petitioner argues that a competent and effective mental health expert could have made "a persuasive case to defeat the finding of future dangerousness." The Court finds that Petitioner does not meet the *Sawyer* test. Petitioner was evaluated by a social worker, Dr. Warren who his counsel chose not to call. Furthermore, the Commonwealth presented much evidence on the question of future dangerousness, and it would be impossible for Petitioner to demonstrate by clear and convincing evidence that an independent mental health expert testimony would have prevented any reasonable juror from finding him eligible for the death penalty.

D. The death sentence was arbitrary capricious and disproportionate.

Petitioner argues that his sentence should be overturned because it is "excessive and disproportionate." Respondent contends that this claim is procedurally barred under *Slayton v. Parrigan*, 205 S.E.2d 680 (1974). The problem with Respondent's position, however, is that Petitioner could not argue that his sentence was disproportionate based on the evidence brought out in Henderson's trial until that trial took place. Thus, he could not argue this claim on direct appeal. The Court finds that this claim is not procedurally defaulted. The evidence at

Henderson's trial including his admission that he committed the murder provides a basis for a hearing that Strickler's sentence was disproportionate to the crime.

E. Improper Jury instructions violated Strickler's Sixth, Eighth and Fourteenth Amendment rights.

Petitioner alleges that various jury instructions by the state court provide a basis for habeas relief. The Court finds that the jury instructions do not alone provide a basis for relief. The state court's burden shifting instruction on malice does not rise to the level of a constitutional violation. In *Peterson v. Murray*, 904 F.2d 882 (4th Cir. 1990) the Fourth Circuit found the exact same instruction permissible. The failure to instruct on mitigating circumstances and the state court's instruction on an improper predicate are procedurally barred. Strickler argues that trial counsel's failure to object constitutes cause and prejudice for the default. The Court does not find that trial counsel's failure to object to two instructions undermines confidence in the verdict sufficient to meet the cause and prejudice standard.

F. Trial court's failure to allow counsel to ask or inform jurors about parole

Strickler argues that this failure to inform jurors about his parole ineligibility violates the Eight Amendment's requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death] penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). In *Skipper v. South Carolina*, 476 U.S. 1 (1986) the Supreme Court held

that mitigating evidence should be defined broadly; its definition would include evidence of parole ineligibility. The Court does not dismiss the claim.

G. Trial court erroneously limited voir dire about juror's ability to show mercy and thus follow their oaths as jurors in considering a life sentence.

The trial transcript reveals that Petitioner's counsel conducted extensive voir dire of the jurors. The trial court prohibited counsel from asking one question about mercy. The Court finds that the inability to present this one question to the jurors does not constitute a constitutional violation. Therefore, this claim is dismissed.

H. Trial judge's refusal to qualify jurors Almarode and Wills.

Juror Wills stated that he could not impose the death penalty under any circumstances; thus he was properly barred from serving on the jury. Similarly, juror Almarode said that she could not vote to convict if she knew there was a possibility that Petitioner would receive the death sentence. The Court finds that the trial judge properly refused to qualify these jurors based on their opposition to the death penalty and dismisses this claim.

I. Refusal to excuse for cause jurors Ramsey and Brooks

The Virginia Supreme Court found that these two jurors were impartial. The Fourth Circuit in *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995) found that such a determination is entitled to federal court deference. The

Supreme Court of Virginia found ample evidence existed to support the trial judge's determination of impartiality and this Court defers to its ruling. This claim must be dismissed.

J. Violation of Strickler's Sixth, Eighth and Fourteenth amendment rights when Commonwealth withheld exculpatory evidence.

Petitioner contends that the Commonwealth withheld exculpatory impeachment evidence about Ann Stolzfus and Donna Tudor. The Commonwealth failed to disclose interviews and letters of Stoltzfus that contradicted and impeached her trial testimony. In her initial police interviews and subsequent letters to the police, Stolzfus could not identify Strickler as the man she saw in the car at the mall, could not identify Whitlock, and only described Whitlock's car and license plate number after viewing the seized vehicle at the police impound lot.

Respondent argues that this claim is procedurally barred. Petitioner states that the Court can hear his claim because his trial counsel's ineffectiveness for failing to file a *Brady* claim constitutes cause and prejudice for his default. "An attorney's effectiveness may constitute cause for excusing a procedural default when a petitioner has a constitutional right to effective assistance of counsel and when that assistance is constitutionally ineffective under the standard established in *Strickland v. Washington.*" *Smith v. Dixon*, 14 F.3d 956, 973 (4th Cir. 1994). The Court finds that the failure of Strickler's trial counsel to pursue a *Brady* motion constitutes cause for the default. Since Stoltzfus was the main witness to place Strickler at the

mall and with Whitlock, his inability to use impeachment material prejudiced him. Accordingly, the Court grants him an evidentiary hearing on his claims.

Petitioner also claims that the Commonwealth withheld impeachment testimony about Tudor. Tudor's first comments to the police fail to mention all the incriminating details about Strickler that she testified to during trial. Petitioner alleges that Tudor had a motive to fabricate her testimony in exchange for immunity on a pending grand larceny charge. Respondent claims that this claim is also procedurally barred; Petitioner asserts the same cause and prejudice argument he made about Stolzfus. The Court does not believe that Tudor's inconsistencies truly prejudiced Strickler, thus it believes the claim is procedurally defaulted.

K. Prosecutor knowingly presented false evidence at trial.

Petitioner argues that the prosecution knew that Stoltzfus manufactured her testimony and thus by allowing her testify they permitted false testimony to be presented in court. Petitioner does not allege that the prosecution knowingly allowed Stoltzfus to lie on the stand. Instead, he is suggesting that since her testimony changed over time, prosecutors knew that her trial testimony could not be true. While the Court believes there may be some merit to the suppression of this impeachment testimony, it does not believe it rises to prosecutorial misconduct as alleged here. This claim must be dismissed and the Court need not reach the procedural default issue.

L. Right to fair trial

This claim has no merit. The prosecution must present the best case it can. The cases Strickler cites in support of this claim describe much more egregious behavior than the behavior at issue here. For the Henderson and Strickler trials, the prosecution was just adopting different trial strategies based on the different cases it had to prove. Such actions do not constitute a constitutional violation.

M. Strickler actually innocent of the crime and sentence

Respondent states that this claim is procedurally barred. Petitioner claims that actual innocence overcomes procedural default under *Schlup* and *Sawyer*. While these two do support a "loop hole" for actual innocence, they establish a very strict standard that is rarely met. In *Schlup*, the Supreme Court held that for a habeas petitioner to pass through the "gateway" and have the federal habeas court reach the merits of his defaulted claims: "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 867.

Petitioner presents new evidence which he claims shows his innocence. He submits the sworn testimony of Jeffrey Woods at Henderson's trial that Henderson admitted he, not Strickler, dropped the rock on Whitlock. He additionally states that Henderson's hair samples were like the hairs recovered from various clothing found at the scene. Henderson's PGM subtype was consistent with that found in vaginal and rectal swabs taken from the victim. Lastly, forensic evidence developed since

Strickler's trial indicates that Whitlock probably died of strangulation and not from head injuries.

Petitioner's new evidence does not meet the *Schlup* standard. Petitioner's evidence only goes to the question of who actually committed the murder. Balanced against the new evidence that points to Henderson's guilt, is the evidence presented by the Commonwealth at Strickler's trial. An eyewitness saw Strickler abduct the victim, his shirt contained traces of human blood and semen, semen was found in the victim's body; Strickler's hair was found near the victim's body, he retained possession of the victim's credit cards, he took her car and made statements about kicking the victim in the head and being a " 'rock crusher." Thus this new evidence does not make it more likely than not that a reasonable juror would conclude that Strickler was not guilty. The Court will dismiss this claim.

N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty.

Respondent states that this claim is procedurally defaulted under *Slayton v. Parrigan*. As Petitioner correctly points out, however, he could not have pointed out errors in the appellate process until the appellate process was over. He argues that the Virginia Supreme Court failed to compare cases where the defendants received life with those cases where the defendants received death. He also argues that the court failed to compare mitigation evidence in various cases; lastly, Strickler

argues that the court's review relied on incorrect statements of evidence at trial. Petitioner brought this claim up on state habeas which was his first opportunity to challenge the Virginia Supreme Court's actions. This claim is properly before the Court, and the Court will grant Petitioner an evidentiary hearing on the claim.

O) Strickler's rights under the Sixth, Eight, and Fourteenth Amendments were deprived by the prosecutor's improper comments in opening and closing arguments.

The Court agrees with respondent that this claim is procedurally barred under *Slayton*.

P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Respondent argues that this claim is procedurally defaulted. Petitioner argues that the claim is reviewable under *Sawyer v. Whitley*. *Sawyer* requires a petitioner to prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty. The jury relied on numerous pieces of evidence to find Strickler eligible for the death penalty. They looked at his behavior before, during and after the killing of Whitlock as well as his continuing criminal activity. Assuming arguendo that the Commonwealth did improperly introduce Strickler's conviction, the jury still had sufficient other evidence to

support its finding of future dangerousness. The Court dismisses this claim.

Q) The death penalty is cruel and unusual and therefore unconstitutional.

The Court dismisses this claim because it is without merit. *See Gregg v. Georgia,* 428 U.S. 153 (1976) (when proportional to the severity of the crime and not a wanton infliction of pain the death penalty is constitutional)

R) Vileness and Future Dangerousness under the Virginia Death Penalty statute are unconstitutionally vague.

In this claim, the Petitioner asserts that the "future dangerousness" aggravating factor under Virginia law is unconstitutionally unreliable and vague. Respondent correctly notes that Petitioner has procedurally defaulted on this claim.

Petitioner purports to evade the procedural default by arguing that the claim is reviewable under *Schlup* and *Sawyer.* The Court concludes that this claim does not meet this standard and is dismissed.

S) Evidence was insufficient to establish either future dangerousness or vileness

This claim is similar to the insufficiency of the evidence argument raised in claim A. The Court will grant an evidentiary hearing on this claim.

T) Juror misconduct

Respondent correctly notes that this claim is procedurally barred. Petitioner contends that he met the procedural hurdle by raising the claim in his state habeas. Since he did not, however, raise it on direct appeal, the Court finds this claim barred under *Slayton.*

U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution.

This claim survives the motion to dismiss and the Court will grant an evidentiary hearing on those matters it has not ruled are procedurally barred.

V) Ineffective Assistance of Appellate Counsel

In Claim V the Petitioner asserts that he was rendered ineffective assistance of appellate counsel because he did not receive an accurate record of the proceedings. The Court finds that this claim is not procedurally defaulted, but that it lacks merit. Accordingly, the claim must be dismissed.

An appropriate order will follow

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

DEC 10 1996
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	Civil Action No. 3:95CV924
v.	)	
J.D. NETHERLAND, WARDEN Respondent.	)	

ORDER

(Filed Jan. 16, 1997)

The Court is in receipt of Respondent's motion to alter or amend its judgment of December 10, 1996. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is ADJUDGED and ORDERED that the Court grants respondent's motion with respect to claims A, D, F, N, and S.

The Court grants an evidentiary hearing on petitioner's claims B, J. and U.

Let the Clerk send copies of this Order to counsel of record.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

Jan. 16, 1997
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner,	)	Civil Action No. 3:95CV924
v.	)	
J.D. NETHERLAND, WARDEN Respondent.	)	

MEMORANDUM

The Court is in receipt of respondent's motion to alter or amend its judgment of December 10, 1996. In its Order, this Court granted petitioner an evidentiary hearing on claims A, B, D, F, J, N, S, and U. Respondent contends that these claims either have no merit as a matter of law, fail to raise a cognizable federal issue or raise only pure legal issues for which an evidentiary hearing is unnecessary.

Claims A and S: Sufficiency of the Evidence to Prove Capital Murder, Vileness and Future Dangerousness

Upon reconsideration, the Court will dismiss these two claims as lacking merit. After further examination of the record, there is enough evidence to support the jury's determination that Strickler committed the capital murder. The Commonwealth presented testimony and evidence that Strickler was present at the murder scene; his shirt contained traces of human blood and semen; his

hair was found near the victim's body; he stole the victim's car and credit cards; he made statements about kicking the victim in the head and being a "rock crusher." The jury had enough evidence to support its finding that Strickler alone committed the murders.

The evidence on the record also supports a jury's determination that Strickler jointly participated in the killings and thus his conviction for capital murder is permissible under Virginia's "triggerman" rule. It was reasonable for the jury to conclude that the victim was bludgeoned to death and not strangled; the evidence about the rock's weight and that one man was needed to hold Whitlock down supports a finding that two men were needed to accomplish the act.

Similarly, the jury's determination of vileness and future dangerousness is also reasonable and supported by the record. Accordingly, the Court will dismiss these two claims.

Claim B. Ineffective Assistance of Counsel

The Court reaffirms its grant of an evidentiary hearing to the petitioner on this issue. Petitioner has not had a hearing on this issue in state court, and thus he has never had the opportunity to fully develop his claim. Petitioner has alleged numerous new facts in support of his ineffectiveness claim, and pursuant to 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963), this Court may grant him a hearing to develop his claim.

Claim D. Arbitrary, Capricious, and Disproportionate Death Sentence

The Court will dismiss this claim because it is essentially a proportionality claim. While *Pulley v. Harris*, 465 U.S. 37 (1984) does not ban all proportionality claims, in the case at bar, Strickler has not presented a constitutional claim.

Claim F. The Meaning of Parole and a Life Sentence

Contrary to respondent's contention, this claim[1] is not procedurally barred. Petitioner raised it on direct appeal and on state habeas. The Court, however, believes that the information Petitioner sought to present to the jury does not constitute a constitutional violation of the Supreme Court's requirement that sentencing authorities consider all mitigating evidence. *See McClesky v. Kemp*, 481 U.S. 279 (1987). The Court will deny an evidentiary hearing on this issue because this claim seeks an impermissible retroactive application of a new rule. Petitioner's claims is analogous to *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) (Capital defendant allowed to rebut evidence of future dangerousness with proof of parole ineligibility.). The fourth Circuit in *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) held that the *Simmons* holding

[1] The Court understands that Petitioner's claim is not that he is "parole ineligible," but rather that he should have been able to inform jurors that no one who has been convicted of capital murder but sentenced to life imprisonment has ever been released on parole. Petitioner also argues that he was not able to ask jurors what a life sentence actually meant to them.

was a new rule that could not be applied retroactively.[2] Accordingly, the Court will dismiss this claim.

Claim J. The Commonwealth Withheld Exculpatory Evidence

The court affirms its grant of an evidentiary hearing on the prosecution's failure to disclose exculpatory and impeachment evidence concerning witness, Ann Stoltzfus. Petitioner has demonstrated cause for his failure to raise this claim earlier. Defense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings.

Claim N. Inadequate and Meaningless Appellate Review

The Court will dismiss this claim. Petitioner challenges the appellate review in his own case. His claim, however, is procedurally defaulted because he did not raise it in his petition for rehearing before the Virginia Supreme Court.

Claim U. Denial of the Right to a Fair Trial

The Court has ordering [sic] a hearing on a several claims dealing with trial errors. Given their nexus to this claim, the Court will deny the motion to dismiss Claim U and allow a hearing to proceed.

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[2] The Court is aware, however, that the Supreme Court has granted review in *O'Dell* on this issue of whether *Simmons* constitutes a new rule. *O'Dell v. Netherland*, ___ S.Ct. ___, 1996 WL 716301 (12/19/96.).

The Court will dismiss claims A, D, F, N, and S. An appropriate Order will follow.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

January 16, 1997
DATE

August 26, 1997, Attachments to Petitioner's Motion For Summary Judgment in federal district court

ATTACHMENT ONE

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v.

Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

CAPTAIN DAN CLAYTOR, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: Captain Dan Claytor, Harrisonburg Police Department, 181 South Liberty Street, Harrisonburg, VA 22801 (540) 434-2433.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I recall speaking with Stoltzfus on January 19, 1990, January 22, 1990, January 24, 1990, January 25, 1990 and February 1, 1990.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I summarized my interviews with Stoltzfus and these summaries are in possession of the Harrisonburg police department.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received letters/summaries from Stoltzfus and these letters/summaries remain in the Harrisonburg police department file.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ Dan Claytor
DAN CLAYTOR

Subscribed to and sworn before me, a Notary Public, this 22nd day of April, 1997.

/s/ Sarah L. Fairweather
Notary Public

My commission expires: March 31, 1999

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v. Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

A. LEE ERVIN, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in

the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: A. Lee Ervin, Augusta County Commonwealth's Attorney, 6 East Johnson, 3rd Floor, Staunton, Virginia 24401.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I spoke with Stoltzfus sometime prior to Strickler's trial but cannot recall the specific date. I was accompanied by Lt. Campbell.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I do not recall documenting my conversation with Stoltzfus.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received no letters/summaries from Stoltzfus.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ A. Lee Ervin
A. Lee Ervin

Subscribed to and sworn before me, a Notary Public, this 25th day of April, 1997.

/s/ Patty B. Campbell
Notary Public

My commission expires: August 31, 1999.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v. Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

LIEUTENANT A. McDORMAN, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: Lt. A. McDorman, Harrisonburg Police Department, 181 South Liberty Street, Harrisonburg, VA 22801, (540) 434-2433.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I believe I may have spoke with Stoltzfus on the telephone but I do not recall the date.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I do not recall documenting any conversation with Stoltzfus.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received no letters/summaries from Stoltzfus.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ Al McDorman
A. McDorman

State of Virginia
City of Harrisonburg

Subscribed to and sworn before me, a Notary Public, this 28th day of April, 1997.

/s/ Sandra Claytor Baer
Notary Public

My Commission expires: February 28, 1999.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER,

Petitioner,

v.

Civil Action No. 3:95CV924

J. D. NETHERLAND, WARDEN,

Respondent.

LIEUTENANT WILLIAM C. CAMPBELL, UNDER OATH, SAYS:

1. Identify the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received any calls or information from, questions, and/or interviewed Ann Stoltzfus in the course of the investigation, trial, and/or post-conviction proceedings against Tommy David Strickler, and/or Ronald Henderson arising from the murder of Leann

Whitlock. Petitioner believes that Det. Dan Claytor, of the Harrisonburg City Police Department, is one such agent, and there may be others.

Answer: Lt. William C. Campbell, Augusta County Sheriff's Department.

2. Identify the date of each such occurrence specified in 1 above and the agent or agents involved.

Answer: I spoke with Stoltzfus sometime prior to Strickler's trial but cannot recall the specific date. I was accompanied by A. Lee Ervin.

3. State whether any notes, record, report, or summary of any type was prepared reflecting such contact with Ann Stoltzfus specified in 1 and 2 above, and the current location and custodian of any notes, record, report or summary.

Answer: I do not recall documenting my conversation with Stoltzfus.

4. State whether any physical evidence of any type, letters, reports, notes or summaries were received from Ann Stoltzfus by any agent of the Commonwealth. State the current location and custodian of these materials.

5. State the name, rank, affiliation, and, if known, current address and phone number of each agent of the Commonwealth who received the materials set fourth [sic] in 4 above.

Answer: I received no letters/summaries from Stoltzfus.

6. Provide any other information known by the Commonwealth that would tend to impeach the credibility of Ann Stoltzfus and/or would indicate that she had fabricated her testimony against petitioner.

Answer: I know of no information which would impeach Stoltzfus' testimony or which would indicate that she fabricated her testimony against Strickler.

/s/ William A. Campbell
William A. Campbell

Subscribed to and sworn before me, a Notary Public, this 29 day of April, 1997.

/s/ Debra W. McQuain
Notary Public

My commission expires: 9/30/99.

ATTACHMENT TWO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	Case No. 3:95-CV-924

CITY OF STAUNTON
COUNTY OF AUGUSTA

AFFADAVIT OF WILLIAM E. BOBBITT, JR.

William E. Bobbitt, Jr., being duly sworn, states as follows:

1. I am the Public Defender for Augusta and Rockbridge Counties and the cities of Staunton, Waynesboro, and Buena Vista. In that capacity, I was assigned to represent Tommy David Strickler in his capital murder trial in Augusta County.

2. The jury trial was conducted in June, 1990, in Augusta County. I was assisted by Thomas E. Roberts, then a part-time Assistant Public Defender.

3. Prior to trial, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County. The prosecutor had an open file policy, and I had access

to these files on more than one occasion. I was permitted to make copies of any materials.

4. I have reviewed the attached Exhibits 1-7 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

5. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I do not have copies of any of the material contained in Exhibits 1-7.

6. I have reviewed my cross-examination of Anne Stoltzfus during Strickler's trial. My cross-examination questions do not rely on any of the materials in these exhibits. I conclude that none of these materials were in the Commonwealth's files when I examined them.

7. I first learned these materials existed when they were shown to me sometime in 1997.

8. The material in Exhibits 1-7 provides powerful impeachment material and should have been disclosed to me pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

9. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

10. The notes, letters and interviews of Anne Stoltzfus contradicted or impeached her trial testimony in a number of respects.

11. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman in the car at the mall, and Stoltzfus provided no description of her clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [Whitlock's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as "a rich college kid," "singing" and happy. Stoltzfus described the clothing she was wearing. These inconsistencies were material for cross-examination.

12. When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could *not* positively identify Stickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr.

478-49. Stoltzfus was also unable to make a positive identification of Henderson from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews stated the opposite.

13. In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She also gave a detailed description of the physical features and clothing of the white woman accompanying them. Ex. 7.

14. Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of to all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Not only does this letter provide reams of impeachment material, it provides a basis to exclude Stoltzfus's testimony altogether. She admits that she did not recall being at the mall on January 5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor

information that never appeared in any of his notes, i.e., she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information would have been very effective in destroying her credibility with the jury.

15. Claytor's handwritten notes of January 19, 1990, contain no mention of Stoltzfus's encounter with Strickler and Henderson in the music store. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and a white women inside the mall. The woman bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her encounter in a music store with Strickler and Henderson. Stoltzfus later gave this testimony at trial. In the January 22 letter, Stoltzfus states she is uncertain that the man she saw in the mall is even the same man that she later saw approach Whitlock's car. Ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> *I have a very vague memory that I'm not sure of.* It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

(Emphasis added.)

The letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered

> driving on past Leggetts and not going in. I placed the time around 9:00 pm *thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no Purchases.* Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(Emphasis added.) Once again Stoltzfus admits that she had not remembered being in the mall that night. Her "memory" is based on what her daughter has told her. Stoltzfus's letters and notes to Det. Claytor provided devastating impeachment material, casting doubt on all of her testimony.

16. There are additional inconsistencies. In Stoltzfus's first police interviews, Whitlock's car was described as "dark blue" with West Virginia tags. In notes labeled "Observations" dated January 19, 1990, and illustrated with diagrams, the car is described as a "dark blue, 'new' sports car West Va. tags." Ex. 3.

17. On January 24, 1990, a police report indicates that Stoltzfus was taken to the police impound lot to view the car. Ex. 2. After viewing the car, she was able to recall the license number, NKA-243, and other details about the car.

18. The letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> *Thank you for your patience with my sometimes muddled memories.* I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really

didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, *I never would have made any of the associations that you helped me make.*

(Emphasis added.) Stoltzfus did not remember the events that she testified about. Her story was apparently developed with the assistance of the police, after viewing the evidence and photographs, and after hearing discussions of the crime on campus.

19. Additional impeachment material is contained in Exhibits 1-7 which is not set forth here.

20. In sum, the suppressed documents satisfy the requirements of *Brady* and *Kyles* for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether suppression of the evidence "undermines confidence in the outcome of the trial." *Kyles*, at 1566, quoting *Bagley*, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The materials should have been disclosed to Strickler's trial counsel.

Further, affiant sayeth not.

/s/ William E. Bobbitt, Jr.
William E. Bobbitt, Jr.

Sworn to before me this
19th the day of August, 1997:

/s/ Linda H. Majer, Notary Public
My Commission Expires: July 31, 2001.

EXHIBIT ONE

transcription of handwritten note

Anne E. Stoltzfus
565 Hartman Dr
H'bg Phone #434-2775

172-36-8187 Car may have been in front of car

1-19-90 Daughter with Katty

1:00 PM 6:00-7:30 P.M. (Illegible) 6:30 P.M.

Left K-Mart t Mall
startled
Pounds window/ Jumped In (Middle Fighting
Backs out/Guy Motion
Girl runs out & guy
Car lurches – horn

Girl (illegible)
Guy in back (illegible) over

Ran over curb
Can't ID B/F
1st W/M
Can ID W/F 5'05" – 140 (Little over weight) Blue Jean
Brown Hair shoulder Plain Face (Pail)
2nd W/M Tall – Dark Hair
Cream Jacket

3:30 PM Show Photo Lineup – Abduction

#6266 – 4663 – 5992 – 4199 – 5976

Henderson
Resemble
#6/Not Sure
Maybe if in person
Beard Not Right

5031 – 4787 – 5900 – 6186 – 6337-5906

Resemble
Strickler
w/m (illegible)
Hair color not right

EXHIBIT TWO

CASE # 90-01-06-0067
SUBMITTED BY DETECTIVE D. L. CLAYTOR

Summary of Interview: Anne E. Stoltzfus
565 Hartman Drive
Harrisonburg, Va. 22801
Phone # 434-2775
SSN/172-36-8187

On 1-19-90 and 1-22-90, Anne E. Stoltzfus was interviewed at the city police department after she advised that she recalled seeing some suspicious activity which might pertain to the LeAnn Whitlock case.

Ms. Stoltzfus advised that on Friday evening, 1-5-90, she was at the Valley Mall and observed a subject jump into a vehicle with a black girl, fight with the black girl,

and then was joined by two other subjects. Ms. Stoltzfus stated that between 6:45 p.m. and 7:00 p.m. she and her daughter had completed their shopping and were leaving the mall, when she observed a black girl in a dark blue car coming into the mall parking area. Ms. Stoltzfus advised that she was sitting at the stop sign at the Penneys end of the mall (west end) when the black girl passed traveling east in front of the mall. Ms. Stoltzfus noted that she then turned right and fell in behind the black girl's vehicle and noticed that it had West Virginia tags. As they approached the front entrance of the mall, the vehicle stopped for what she thought was a bus or some type of vehicle. Ms. Stoltzfus advised that she observed a white male, long scraggly hair, run up to the passenger window of the black female's car and started pounding on the window and attempting to open the door. The subject appeared agitated and wild. He pulled open the door and jumped in next to the black female and got right up next to her. The black female started hitting the guy. The guy then turned and motioned and a white female and a second white male ran from the entrance area to the car. The female was described as 18-21 years of age, 5'5", 140 lbs., (A little over weight), blonde/brown shoulder length hair, pale plain face, wearing blue jeans and denim jacket. The second white male was described as tall, 6', dark hair, cream colored jacket.

Ms. Stoltzfus advised that as the white girl attempted to crawl into the back seat the car lurched forward and the horn started blowing continuously. The girl jumped back and the second white male ran back to the entrance of the mall. The black female and the first white male started fighting again, until the horn stopped blowing.

The white female and the second white male then got into the back seat of the vehicle.

Ms. Stoltzfus stated she pulled up beside the vehicle to see if the black girl was ok but could not get her attention. The black girl just stared forward. At the same time she noticed that the white female in the back was staring back at her and the white male in the back seat was attempting to hide down in the seat. Ms. Stoltzfus advised that she moved forward a little and looked back at the black girl, still trying to get her attention. She noted that the black girl was glancing her way but still did not turn her head, and was mouthing something which in thinking back could have been "help". Ms. Stoltzfus advised that she drove up to Medco and pulled over to see if the black girl was ok. The car drove past her and everything seemed ok. However, when the vehicle got up to Leggetts Store it drove up over the curb and the horn again started blowing. The vehicle continued on and was last seen heading toward Rt. 33.

Ms. Stoltzfus advised that she was not sure whether she could identify the white males but felt sure she could identify the white female. She further advised that prior to the incident in front of the mall, she recalled seeing who she thinks were the same blondish haired male and white female inside the mall. The white female bumped into her because the white male, who again appeared agitated or high, was yelling at her to get someone (she could not recall who) to meet him at the bus stop. Ms. Stoltzfus advised that the incident occurred very quickly and that her daughter did not see anything.

Anne E. Stoltzfus was shown the following picture show-ups after first reading the Photographic Show-Up Admonition:

6266, 4663, 5992, 4199, 5976, R.C.S.D. # 12527. Ms. Stoltzfus pointed out R.C.S.D. # 12527, Ronald Henderson as resembling the subject described as white male # 2. Ms. Stoltzfus advised that it looked like the subject but the beard was not right. She noted that if she saw him in person she might be able to identify him positively.

Photo Show-Up # 5031, 4787, 5900, 6186, 6337, 5906. Ms. Stoltzfus pointed out picture # 6337, Thomas David Strickler, as resembling the subject described as white male # 1. Ms. Stoltzfus advised that the hair color was not right in the photo. She advised further that she might be able to identify him positively if seen in person.

CASE # 90-01-06-0067
SUBMITTED BY DETECTIVE D.L. CLAYTOR

1-24-90 Approximately 6:25 p.m. Anne Stoltzfus was shown a photographic show-up including photos # 5346, 5351, 9107, Connie Lamb photo, R.C.S.D. 9771, and 5676. Ms. Stoltzfus first read the photo show-up admonition and after viewing the photos advised that she could not identify any of the photos as the female who she observed enter Ms. Whitlock's car. She advised that if she saw the subject in person she would know for sure.

1-24-90 Approximately 7:10 p.m. Ms. Stoltzfus was taken to the county impound lot where she viewed the Mercury Lynx, W. Va. license NKA-243. Ms. Stoltzfus advised that the vehicle

looked like the one at the Valley Mall. she stated that it was the right color, size, and it had the same little blue stripe down the side, and had the same colored interior as the one she saw.

1-25-90 Anne Stoltzfus advised that she had seen photographs of LeAnn Whitlock and, without a doubt, she was the black female that was operating the blue vehicle with West Virginia tags who she observed at the Valley Mall on 1-5-90. Ms. Stoltzfus further advised that the vehicle she viewed on 1-24-90 was the vehicle she saw at the mall. She had made up a quote to help remember the license number after the incident, "No Kids After 2-43".

2-1-90 Approximately 9:30 a.m. Anne Stoltzfus, accompanied Detective Claytor to the Rockingham District court to attempt to identify the female she saw on the evening of 1-5-90 with Tommy Strickler and Ronald Henderson. Ms. Stoltzfus observed a female known as Mary Jane Oplander and stated that Oplander looked like the girl she saw on 1-5-90.

EXHIBIT THREE

Observations

[Diagrahm Omitted In Printing]

1.) Black girl parked in front of valley mall Entrance in dark blue "new" sports car West VA. tags. Scroungy "bum-type", "W.Va. hick" with long scraggly blondish

hair (male) runs to passenger window, pounds impatiently, then opens door & jumps. (A *girl & guy* leaning against outside wall; A few people inside Mall Entrance.

[Diagram Omitted In Printing]

2.) Black girl starts hitting the guy in her car. He backs out (part way) and waves to the girl & guy).

3.) The girl & guy # 2 run towards car. Girl puts one leg inside car, car lurches forward, & driver honks horn continuously. The girl (avg. ht. – 140lb, blue j., lt. brown hair, plain face, no make jumps back & the guy # 2 runs back toward wall.

4.) Guy # 1 & black girl start fighting again. She stops blowing horn and girl & guy # 2 (tall, dark hair, lt. cream jacket get into back seat & lean forward in a huddle with guy # 1.

Action: 5.) I drive around car & parallel to car. I look over to see if black girl is O.K. She just stares straight ahead. Girl in back seat stares at me. I feel uneasy but uncertain of my uneasiness. [Arrow Omitted In Printing].

6.) I drive on to Medco Drug & park to see if the black girl is O.K. [Diagram Omitted In Printing].

7.) She drives the car past me, around corner, & at curb marked X above drives up over curb & honks horn. I follow them. They look normal. They turn left to go out to 33 & I turn right to go out other direction.

EXHIBIT FOUR

565 Hartman Drive

Harrisonburg, Virginia 22801

January 22, 1990

Dear Sargeant Claytor:

I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped jog my memory. I have an extraordinary visual memory but I hadn't placed all my mental pictures together with that same night.

Katie remembered my only purchase at the Mall of 4 name cards at $0.75 each at Centerpoint. We both remembered our trek after Centerpoint, but I thought it was a different night. So I knew that if I could confirm that one purchase, all the associated mental pictures following would have occurred January 5. I did this morning confirm by Centerpoint bookstores' cash register tape a purchase of that amount at 4:40p.m. (showed 4:30-10 minutes slow). This means that I can construct with good confidence our exact journey and get more accurate time estimates.

I picked up Katie shortly after 4:15pm at the Medical Arts complex and headed to the Mall. We went first to Centerpoint bookstore to purchase a specific CD. They didn't have it and I purchased the name cards at 4:40pm and we left for K-Mart. I purchased a prescription and some

other merchandise at 5:31pm (confirmed by cash register tape and also back of check #1190). We left K-Mart and drove back over to the Penney's catalogue sales/ Watson's lot. From there we went to:

Approx. Time	Place	Specific Memories
5:40pm	Centerpoint	Check to see whether we could *order* CD They didn't know how; suggested we try Record Corner or Musicland
5:45pm	Record Corner	No luck
5:50pm	Musicland	Wasted 15-20 min. trying to get help to find the CD.
~6:05-6:10pm		Told to come back in about half an hour to find someone more knowledgable [sic].
~6:10pm	Watson's	Looked around for half an hour.
~6:40-6:45pm	Musicland	Got there, still had to wait 5-10 min. Another guy finally came and helped but was no help.

**On the way back to Musicland the 2nd time I remember a girl who looked just like the girl who got into that car bumped smack into me. She was walking toward me facing the other (Leggetts) direction. A revved-up mountain man was yelling at her that he would meet her out at the bus stop. He went around the display and up the B.

Dalton bookstore side and could have been the same guy who knocked on the car window because he had the same weird walk-like-an-animal gait. I remember looking at my watch and a gentleman who saw me asked me what time it was. I have a vague memory that my watch said 6:50 but is 5 min fast so I answered 6:45pm.

~6:50- 7:00pm	Centerpoint	Asked briefly when someone would be in so that I could place the CD order and was told tomorrow (Saturday) manager Abe Clymer.

Approx. 6:55-7:05pm Returned to car. Had discussion about ear piercing and I decided to take Katie to Leggetts to show her earrings for unpierced ears. **We drove around the front of J.C. Penneys, stopped at the stop sign, and the black girl in dark blue car drove past.** (I saw a car that looked somewhat like hers parked next to the railroad tracks across from Valley Heritage (a company car?) only it was lighter blue.) Then I turned right and pulled up behind the black girl, noticed the West. VA tags, and observed the other things I told you.

Observations that corroborate the time that I saw those 3 characters get in the black girl's car to about 6:55 to 7:10pm are Katie's and my combined memories on when we got back home. Katie remembers being mad because everyone had already eaten supper and I heated up some spaghetti sauce for her but refused to cook some noodles because it was so late. I remember the argument. My memory is that I said it was only 20 after 7, which may have been 7:15 because our dining room clock is 5 min.

fast. I also remember arguing that it would be close to 8:00 by the time I spent half an hour cooking noodles. She remembers being upset that she couldn't watch TV because her dad was still watching his news program (McNeil/Lehrer Hour: 7-8pm). This means we got home after 7pm, because the children watching TV during the 6:30-7:00 national news is never allowed. It also means we got home before 8pm. I drove home the "back way", which may have taken 10 to 15 min.

I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window.? Were those 2 memories the same person? The black girl couldn't drive when the bus pulled out because about 2-3 people coming from the parking lot walked in front of the car.

I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there. That was corroborated by Centerpoint this morning, so I feel very certain about the above approx. times.

Sincerely,

/s/ Anne Stoltzfus
Anne Stoltzfus
172-36-8187

transcription of handwritten note:

P.S. 1) Katie doesn't remember seeing the 3 people get into the black girl's car, but she does definitely remember my pulling over at Medco Drug and explaining that I wanted to "make sure those people were O.K." She remembers that as she was looking backward and asking "Who?" I said "there they go – up over the curb" (around the corner of Leggetts).

2) Katie also had a specific memory of my buying the 4-75¢ name cards during the *first* visit to Centerpoint, which was corroborated by the Centerpoint register tape.

EXHIBIT FIVE

Notes for Detective Claytor:

My Impressions of "The Car"

(Anne Stoltzfus)

I remember the car as dark blue (navy) and shiny. The make was definitely not foreign but American. It was not a Subaru, Toyota, Mercedes, Renault, Peugeot, VW, or Honda. It was not a Buick or Cadillac. It was not a large, full-size car and not a mini car. I think it was smaller than a Buick Skylark and about the size of a Buick Skyhawk.

I can best describe the car in comparison to my VW Rabbit. The car was wider than my Rabbit, maybe two feet wider. It was higher than my Rabbit, maybe 3-6 inches higher. It was longer than my Rabbit, at least in front – by maybe a foot.

It was a standard boxy American style. [I remember looking for the make and not being able to see it in the dark. I have a *vague impression* of silver letters on the left rear that said *"Hollar"* beside or inside an oval emblem, but I'm not at all sure.] The lines of the car were straight and parallel to the road, i.e., the rear was not jacked up like many cars are. I *think* it was a two-door.

EXHIBIT SIX

1-25-90
1:45am.

Detective Claytor:

Tonight I identified beyond a shadow of a doubt that the black girl I saw 1/5/90 was LeAnn Whitlock. I spent several hours with John Dean looking at current photos from which I made the identification.

(Also his description of the girl in jail seems to pretty closely match mine.)

Thanks.

– Ann Stoltzfus

EXHIBIT SEVEN

January 26, 1990

Dear Detective Claytor:

As soon as I saw John Dean's pictures of LeAnn Whitlock. I knew beyond a shadow of a doubt that she was "the black girl" and then I remembered the license number. To realize that I actually witnessed LeAnn's abduction is terribly upsetting because I came so close to notifying the police and to doing a couple other things that could have made this totally different. Even when I saw the car, I thought it could have an exact duplicate with a different owner. (As long as I could block out the license number, I could believe that.)

I should be able to identify all three of the persons I saw get into that car if I saw them in person, because I not only saw them get into the car but two other times inside the Mall. I am sure they are the same people. The first time I saw them was about 6:00pm inside Musicland. I had been waiting for a very tall, black guy ("Ron"?) to wait on me and as soon as he was free these three people came in. Mountain Man was impatient and I instinctively backed up and almost into the dark-haired quiet guy. My entire left arm brushed a long tan light-weight coat of a synthetic fabric that was draped over his right arm. I told "Ron" to wait on them first. When "Ron" was done with them he disappeared and a girl told me to come back in half an hour. The reason I had to wait when I came back to Musicland was because "Ron" never returned. A short, brown-haired guy ("Bruce") waited on me. They might remember and be able to identify these characters for you.

As I was returning to Musicland I had the hefty blonde girl crash into me and almost get her button snagged on my open-weave sweater, as I had told you. I'm sure this is the same girl who got into that car. Her face was round, her hair dark-blonde, scraggly, straight-cut almost shoulder length. I think she had a few freckles and I think grey-blue eyes. She had a certain "not-too-bright" look. She looked like an anemic, dopey version of woman #3 (upper-right-hand corner) in that group of pictures you showed me. As she bumped into me Mountain Man was yelling at her "I have to get out of here. Where's Ronnie?" She turned and I turned and saw the dark-haired guy standing near the end of the display toward J.C. Penneys in a long tan trench-type coat. Mountain Man said, "You and Ronnie meet me at the bus stop." She said, "Where's the bus stop?" I said, "Up at the Mall entrance." I remember Mountain Man was multi-layered. The bottom layer was a grey T-shirt that I think had blue writing "Harley Davidson" on it. My impressions flow together but I'll describe them anyway. The outer layer had a colorful bird decorated on the back and I think red letters that said Fawley or Raleigh. In between layers were flowing, open in the front, and maybe longer than the outer layer. I think one layer was a faded denim-blue color shirt and another a greenish-greyish flannel shirt.

Another point of clarification. I think it was a white(?) pick-up truck that stopped ahead of us to turn left. I remember thinking, "They went in and parked and are now walking in front of the blue car while we're still sitting here waiting to go." Those people might remember the abduction. Also, when LeAnn laid on the horn there were 6 or 8 people inside the Mall entrance who looked

out to see what was going on. There were a couple people in the parking lot who stopped and looked. They might be able to identify these characters.

Back to "the girl" . . . I told you she was the same height as me (5'6"). But I forgot that I am shorter because of a spinal injury and vertebral collapse (spondylolisthesis). I measured myself this morning as 5'4". She would wear about a size 14 or 16 blouse and about size 16 jeans. [I have a crazy association of another girl who reminds me of this girl and probably is not. But I'll tell you anyway. December 1987 I was working at Leggetts at Valley Mall as a sales clerk. A girl who looked similar to this girl came in and tried to get a cash refund from me for merchandise she had just gotten in exchange for a $90 dress that had been stolen. I alerted security and detained her long enough for a hot-headed hick waiting for her in the car to come in and raise a ruckus.]

Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw LeAnn's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make. Now that I know what it was that I saw, I have been very upset and I really don't want to look at any pictures or people for a while. I need to be trying to study. I am really glad you left me in the dark all this past week, because otherwise I think I would have been too upset to remember anything. I want to cooperate

in your investigation and would be willing to help later on. It's just that right now I need a break. Thanks.

Sincerely,

/s/ Anne Stoltzfus
Anne Stoltzfus

EXHIBIT EIGHT

Details of Encounter with Mountain Man, Shy Guy, & Blonde Girl

My first encounter with Mountain Man was about 6:00 p.m. January 5, 1990. I was in Musicland at Valley Mall waiting to be waited on when he stormed in with Blonde Girl. I instinctively backed up and into Shy Guy. I remember touching the long tan coat he had draped over his arm and thinking that I felt something hard. I apologized and Shy Guy smiled slightly. As he quickly put on his coat and put his hands into his pockets, his soft brown eyes dispelled my fears. The tall black Musicland clerk (Ron or Rob) came over to wait on me and I told Mountain Man to go ahead since he was so impatient.

About 45 minutes later I saw Mountain Man again when he was coming toward me as I approached Musicland coming from the Centerpoint Bookstore direction at Valley Mall. Shy Guy had just walked past me and Blonde Girl was walking toward me several yards ahead of Mountain Man. Mountain Man was yelling, "Donna, Donna" very loudly, I asked Blonde Girl if she was Donna and she said, "Donna or Sharon". I said, "He wants you."

(I stopped in my tracks and watched Mountain Man because he was so revved up that I thought he was either manic or on drugs.) She turned around and Mountain Man said, "Where's Ronnie?" She said, "Up there", pointing toward Penneys. As Blonde Girl started walking, Mountain Man yelled, "I gotta get outa here. You and Ronnie meet me at the bus stop." She looked back and said. "Where's the bus stop?" and crashed into me. We both apologized and I then gave her directions to the bus stop. Then I promptly tried to follow Mountain Man up the other side of the display because I was concerned about his behavior, but I lost him and proceeded back to Musicland.

I spent about 5 minutes in Musicland, 10 minutes in Centerpoint Bookstore, and then went to my car in the Watson's/Penneys' lot. This was approximately 7:00 p.m. I was with my 14 year old daughter.

I drove in front of the west end of Penneys and stopped at the stop sign. A black girl in a nice shiny dark blue car drove in. She was singing. (I remember thinking. "Rich black college kid.") I turned the corner and stopped behind her at the Mall entrance. I noticed her West Va. tags and thought, "Rich black college kid from West Va." She had stopped because there were vehicles ahead of us. My memory is some sort of mini-bus was parked and waiting to leave. Mountain Man had come tearing out of the Mall, ran up to the bus and yelled at the driver, and then hit the back of the mini-van/bus as it drove off. I remember telling my daughter to look at "that madman". Ahead of the black girl was a pick-up truck, which was waiting to turn left. About this time Mountain Man ran up to her car (passenger side) and started yanking on the

door handle and yelling. He couldn't get the door open and started pounding on the window. She reached over to the door I believe to make sure it was locked, because Mountain Man tried again and was furious and didn't get it open until he shook and shook the door with both hands. He jumped into the car, smack up against her, and she crouched toward her door and started hitting him with her right arm. (I thought it was a domestic squabble. Mountain Man didn't look like he fit with her, but he did look like he came from West Va.) The Mountain Man leaned back over, opened the passenger door, and motioned to Blonde Girl and Shy Guy to come. They had been leaning up against the outside wall. Blonde Girl put one foot into the car and the car lurched forward and nearly hit the family from the pickup truck that had parked. The black girl laid on the horn for quite a while and Mountain Man kept hitting and hitting her until she stopped. (This caught the attention of 8-12 people inside and outside the Mall, but they all seemed curious at first and then unconcerned.) Then Blonde Girl got into the back seat and Shy Guy followed. He handed his tan coat to Mountain Man, who laid it down on the floor and fooled with it for a while. Blonde-Girl and Shy Guy sat front on their seats touching the black girl while Mountain Man was bent over (all buddies, I thought). As soon as Mountain Man sat up and came over against the black girl, the other two sat back and relaxed.

But the black girl wouldn't go, I tapped the horn and there was no response. (Now I was starting to get worried.) I pulled up beside them, exactly parallel, honked the horn to get her attention, but she sat there expressionless, like a mannequin. I jumped out of the car and

started to walk between the two cars to talk to her, but there wasn't enough room. Shy Guy looked scared and laid down on the back seat as if to hide. Blonde Girl kept staring at me. I got back into my car and pulled front so that the black girl had a complete view of me. I asked her three times. "Are you O.K.?" Each time she would meet my eyes and then purposefully look down to her right side. I was frustrated because she was expressionless and said nothing and seemed to intentionally look away. (I wonder now if there was a knife or gun at her side.) Finally, I pulled forward a bit more, honked the horn, and said again, "Are you O.K.?" This time she mouthed, "Help". I started to drive away and only when I reached Medco Drug did I realize that she was saying, "Help". I pulled over and told my daughter to run in to get security but about that time the black girl started driving past us. I had my daughter write down the license number on a 3x4 card – West Va./NKA – 243.

As the car went around the corner at Leggetts it went up over the curb. The car really tilted, the horn honked, people were hitting each other, and I thought the whole bunch of them must be drunk. My daughter and I followed them out to the stop sign. They sat for a while at the stop sign and they all seemed calm again. I told my daughter to help me remember, "No Kids Alone to (2) 43. 2+43 makes 45, my age." Then they turned left and got into the lane to head back into town. I was going to follow them, but they switched lanes to head out 33 East. I noticed I was almost out of gas and I am not familiar with that part of Rockingham County, so I drove back toward the telephones at the theatre entrance to call the police. (When I got there I realized all I could say was

some kids that looked like they were drinking and fighting and carrying on were driving out Rt. 33.) I rationalized away my bad vibes and decided to drive on home and get my family their supper.

So where is the 3x4 card?. . . . It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU. I was too busy to read the paper or listen to the TV news. I did learn at JMU that LeAnn Whitlock had disappeared from Valley Mall January 5, but I hadn't seen a black girl inside the Mall that night and didn't make the association. The following week it was a frequent topic of conversation in my classes. Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag. I remember the thought running through my mind. "The police won't find it there." My heart started racing and I said outloud. "What?! Am I paranoid?" But I still made no association.

Wednesday I saw a newspaper picture of John Dean's car, but I didn't *consciously* recognize it. The newspaper bothered me, so I put it on a pile of papers by the woodstove. The picture still haunted me and distracted me from studying. I finally tore it up and burned it in the woodstove.

Later Wednesday in one of my classes I was talking with Kim Davis and some other black students about LeAnn. I told her that I was at the Mall that night, but

that I didn't see any black girl inside the Mall. Then I told her about the crazy car in front of me. She reported that to the police. Thursday afternoon a detective came to my class and Friday I had to go to the police station to talk to Detective Claytor.

All weekend whenever I tried to get to sleep I was haunted by this nonsense chant, "No Kids Alone to 43." I still made no conscious association. I did know that it was unusual for me not to remember license numbers. Even later when I saw John Dean's car and recognized many of the details, the interior grey, etc., I could not recognize the license number. I did know that every time Detective Claytor asked me about the number I felt like I was going to cry. Later that night when I saw pictures of LeAnn and Knew she was the black girl in that car, I immediately knew the license number.

–Anne Stoltzfus

September 8, 1997, Attachments to Petitioner's Reply to Warden's Opposition to Motion For Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	Case No. 3:95-CV-924

CITY OF WAYNESBORO, VIRGINIA

AFFIDAVIT OF HUMES J. FRANKLIN, JR.

Humes J. Franklin, Jr., being duly sworn, states as follows:

1. I am an attorney, admitted to the Bar of Virginia, and my office is located at 129 N. Wayne Avenue, Waynesboro, Va.

2. In 1990, I was assigned to represent Ronald Lee Henderson in his capital murder trial. Henderson had been charged along with Tommy Strickler in the abduction, robbery and murder of Leeann [sic] Whitlock. The indictment was brought in Augusta County and subsequently transferred on defendant's motion to the Circuit Court for the City of Winchester.

3. The jury trial was conducted in March, 1991, before Judge Bumgardner. Henderson was convicted of first degree murder and sentenced to life imprisonment. The prosecutor was A. Lee Ervin, Commonwealth's Attorney for Augusta County. Ervin had prosecuted Strickler in 1990, and Strickler was convicted of capital murder and sentenced to death.

4. On February 7, 1991, I filed a Motion for Discovery and Inspection requesting in relevant part, "Any statements allegedly made by any person which show or tend to show any information within the knowledge of possession of the Commonwealth which tends to be exculpatory, mitigating, or otherwise favorable to the defendant," *id.* at ¶ B.1., as well as "Any and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence or which arguably could lead to such records or information," *id.* at ¶ 10.

5. The Commonwealth filed an Objection To Defendant's Motion For Discovery And Inspection on March 5, 1991. In response to B.1, the Commonwealth agreed "to provide any exculpatory evidence that it may have knowledge of." As to 10, the Commonwealth agreed to provide "any exculpatory evidence that is within the knowledge of the Commonwealth's Attorney."

6. On March 20, 1991, the trial court entered an Order directing in relevant part that the Commonwealth's Attorney "provide all exculpatory evidence that he has knowledge of to [Henderson]."

7. Pursuant to that Order and the Commonwealth's consent, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County prior to Henderson's trial. I had access to these files on more than one occasion, and I was permitted to make copies of any materials.

8. I have reviewed the attached Exhibits 1-8 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

9. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I could not find copies of any of the material contained in Exhibits 1-8.

10. I have reviewed my cross-examination of Anne Stoltzfus during Henderson's trial. Exhibit 9. My cross-examination questions do not rely on any of the materials in these exhibits. I must presume that none of these materials were in the Commonwealth's files when I examined them.

11. To the best of my knowledge I first learned these materials existed when they were shown to me sometime in 1997.

12. The material in Exhibits 1-8 provides powerful impeachment material and should have been disclosed to me pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

13. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler and Henderson on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

14. I believe the notes, letters and interviews of Anne Stoltzfus contradicted or impeached her trial testimony in many significant respects. The materials also provided a basis to bar her testimony altogether since Stoltzfus stated that her "memories" were based on conversations with her daughter. Had I known of these materials, I would have made a motion *in limine* to prohibit Stoltzfus' testimony.

15. The documents satisfy the requirements of *Brady* and *Kyles* for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether undisclosure of the evidence "undermines confidence in the outcome of the trial." *Kyles*, at 1566, quoting *Bagley*, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The materials should have been disclosed to me as Henderson's trial counsel.

Further, affiant sayeth not.

/s/ Humes J. Franklin, Jr.
Humes J. Franklin, Jr.

Sworn to before me this
5th the day of September, 1997:

/s/ Eileen P. Illegible
My Commission expires on: 9/30/99

Exhibit Nine

VIRGINIA:
IN THE CIRCUIT COURT OF AUGUSTA COUNTY

HEARD IN:
THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA — 90-CR-470
VS. — 90-CR-471
RONALD LEE HENDERSON

WINCHESTER CIRCUIT
COURTROOM,
ROOM 3-D
WINCHESTER, VIRGINIA 22601
MARCH 26, 1991

The above-entitled matter came on to be heard for the purpose of second day of trial at 9:00 o'clock, a.m.

BEFORE:

THE HONORABLE RUDOLPH BUMGARNDER, III
PRESIDING

APPEARANCES:

FOR THE COMMONWEALTH: A. LEE ERVIN, ESQUIRE
COMMONWEALTH ATTORNEY
and
RICHARD E. MOORE, ESQUIRE
ASSISTANT COMMONWEALTH ATTORNEY
ONE LAWYERS ROW
STAUNTON, VIRGINIA 24401

FOR THE DEFENSE HUMES J. FRANKLIN, JR., ESQUIRE
JEFFREY A. WARD, ESQUIRE
129 NORTH WAYNE AVENUE
POST OFFICE DRAWER 1140
WAYNESBORO, VIRGINIA 22980

COURT REPORTER LANELL H. BERGER

* * *

[44] A Yes.

RECROSS-EXAMINATION

BY MR. FRANKLIN:

Q Let me see if I understand that, Mrs. Smith. Now, we are not talking about Mr. Strickler. We are talking about Mr. Henderson. And, when you observed him that afternoon his jeans were filthy dirty at that time?

A Yes.

MR. FRANKLIN: No other questions.

MR. ERVIN: No other questions.

THE COURT: You may step down.

MR. ERVIN: Your Honor, may this witness be excused?

THE COURT: Any objection?

MR. FRANKLIN: NO, sir, Your Honor.

THE COURT: You may be excused.

(WHEREUPON, the witness is excused from further attendance upon the Court.)

MR. ERVIN: Call Ann Stolzfus.

WHEREUPON,

ANN STOLZFUS

was called as a witness on behalf of the Commonwealth, and after having been first duly sworn was examined and testified as follows:

DIRECT – EXAMINATION

[45] BY MR. ERVIN:

Q Ann, would you state your full name, please?

A Yes. My name is Ann Hess Stolzfus.

Q And, where do you live?

A I live in Harrisonburg, Virginia on weekends and Richmond, Virginia during the week.

Q And, what are you doing in Richmond?

A I am in pharmacy school.

Q Pharmacy school?

A Yes.

Q Ann, I direct your attention back to the afternoon of January 5th of 1990. Do you remember that day?

A Yes. I do.

Q Did you go any place in particular that afternoon?

A Yes. I went to the Mall to do some last-minute Christmas shopping, because my college-age daughter

was not coming home until Sunday. So, we were having our Christmas on January 7th.

Q Who all went with you to the Mall?

A My fourteen-year old daughter.

Q About what time did you go to the Mall?

A We headed out about a quarter after 4:00 and . . .

Q Just tell the jury where all you went, Ann, and what happened.

A Actually, I started at 4:00 o'clock. I went [46] to JMU, because I was then a full-time JMU student. I paid my tuition. I went across the street and picked up my daughter from the doctor's office. We ran over to the Mall. Went to Centerpointe Bookstore to look for a certain C.D. disc that my oldest daughter wanted for Christmas.

And, Centerpointe Bookstore didn't have it. So, we said that while we are here we will run across to K-Mart Pharmacy and pick up a prescription that I had gotten filled. And, so we were there from about 4:30 to 5:30. We bought a few things.

And, then my daughter got the idea that if we went back over to the Mall and checked the other music stores that maybe they would have the C.D. disc, even though it is a religious disc. And, so, we did that. We went back and parked outside Centerpointe and went in to check at Record Corner, and then on down to Musicland. Got down to Musicland probably about ten minutes to 6:00, p.m.

Q Did something happen inside that was unusual?

A Well, I asked the girl that waited on me if they had this disc, and she said that she didn't know that I would need to wait for a tall clerk named, Rob, to wait on me. And, so I was waiting patiently for Rob to get finished with some other customers. And, in walked a [47] blond girl and a mountain man. Now, the mountain man was vaguely familiar to him, because I had seen him two years before when I worked at Leggetts over Christmas break and I had waited on him. So, he was familiar to me. And, his "revved-up" character was familiar to me.

Q What did this so-called "mountain man" look like? How did you come up with a. . . . Is this the name that you gave him, "mountain man"?

A Well, to be truthful, it was the name that the clerks at Leggetts called him. They had had contact with him two years previously. They called him "mountain man" and they told me at that time that they thought he was from West Virginia. So, I just remember it as soon as I saw him. "Oh, that is mountain man."

Q What happened then?

A He came in and was "revved-up" in nature and impatient and asked the same girl . . . I don't remember what he was buying, but the girl told him the same thing. That he would have to wait for Rob.

Well, Rob finished with the other customer and came over to wait on him and the blonde girl stepped back and sort of got her hair . . . Her hair was all frazzled, because it was a very windy day. So, I instinctively stepped back just to get away from her, and because mountain man was kind of intimidating. And, I stepped back into [48] a

relatively tall dark-haired man. And, I stepped a little bit on his foot and bumped against a coat that he had draped over his arm.

Q What type of coat was this? Do you remember?

A My memory is not real clear. I will just say, I remember things in pictures. So, I sort of had a vague picture. But, I remember feeling it and it felt like a synthetic-type material. I think it was tan and I think it was kind of long. I do remember bumping into something hard. And, as soon as I bumped into him I said, "OH, I am sorry." And, looked up at him. And, I remember being struck by how familiar he looked, because he looked like some of my relatives with dark hair and large dark eyes.

Q Before you go on, let me show you Commonwealth's Exhibit Number Nine, a photograph of Thomas David Strickler and ask you if you recognize that man?

A Yes. I do. That is mountain man.

Q That is mountain man, here.

Did you give a nickname to the other man that was in there?

A Well, later when I was telling someone about it I called him, "Shy-guy", because he seemed shy. When I bumped into him he just kind of very slight, just had a very faint smile, and then kind of nervously fidgeting [49] with his coat pocket, I guess, to check whatever was there that I had knocked out.

And, then I just asked him briefly if he was waiting for Rob, too. He said, "No. I am with that other guy." Something to that effect.

Q So, what happened then?

A Well, Strickler purchased the few things that he was getting and as soon as Rob was . . . Rob was at the cash register just inside of the store entrance. And, as soon as Rob was finished, it was about 6:00 o'clock, he just walked out of the store. We were waiting. And, the girl said, "Well, he will be back in about a half an hour. He must have gone to lunch, or supper."

So, my daughter and I decided to put in time, because, you know, I really wanted to get this C.D. disc. So, we went on down to Watson's and shopped around for about a half an hour. And, actually, it was more like 45 minutes.

About a quarter of 7:00 we came headed back up towards Musicland, again. And, as we are coming down the center of the Mall I ran into these characters, again. And, first I saw mountain man just yelling, and he was yelling a name and it wasn't real distinct. And, I saw the blonde girl, and I thought he was probably calling her. So, I stopped and asked her if he was calling her.

[50] I know he was calling her a name that started with "D". I think it was "Dawn". It may have been "Della". I am not hundred per cent sure. But, I stopped and asked her if that was her. And, she said, "Well, my name is Della . . . Donna . . . whatever". And, also something else.

Q Where did you all go after that, then? What happend after that?

A I am trying to remember. I just have this picture of shy-guy standing down the hall. Of mountain man

saying to the blonde girl . . . and he was very revved up. I remember getting close to him just to see if I could smell alcohol on his breath. And, I did not smell alcohol on his breath. And, he said, you know, "I have got to get out of here. I have got to get out of here. Go. Go. Meet me at the bus stop."

And, the blonde girl, as she was . . . you know, she was sort of walking backwards while he was still talking to her, and he bumped into me . . . Excuse me, she bumped into me. And, then she asked me where the bus stop was, and I told her that it was up at the Mall entrance.

And, mountain man headed up the Mall that way and the blonde girl went up with shy-guy this way. They went out . . . I went on into Musicland with my daughter to check with another clerk to see whether they had that [51] C.D. disc and it turned out that they didn't. So, we went back out through Centerpointe to see if we could order it from Centerpointe, and then we couldn't because the manager wasn't there. So, we went out to our car and we were going to go home and just head out in that direction, but instead we decided to go around and check for something else at Leggetts, which is around the other way.

Q So, what happened then?

A So, I came out, you know, like here is J.C. Penny's I came out here at J.C. Penny's like the west side of Penny's and stopped at the stop sign. And, in came a shiney dark blue car. Now, this was, maybe ten minutes to seven, something like that. Shiney dark blue car with a

black girl in it, and she was singing and she appeared to be just very cheerful.

And, she pulled up in front of the Mall entrance and I turned right and pulled up behind her. It turns out she couldn't go. She had to stop. And, right there there are three lanes. There is a parking lane, and there is single lanes for the two directions of traffic. So, we were in the single lane.

On the right part in front of the main Mall entrance was a greyish, bluish van of some sort that was leaving off probably high school kinds. And, just to the side of that, right in front of this blue car was a white [52] pick-up truck with a man, a woman and a teenage boy. And, they had stopped to wait for traffic coming this way to turn left to go in and park.

They did go in. First the man pulled off, then the pickup truck. Then the pickup truck turned left and people went and parked. But, okay . . . I should back up and say, when I pulled up to the Mall entrance I noticed that shy-guy and the blonde girl were standing outside of the Mall against the wall just sort of leaning back, resting against the wall. Mountain man was nowhere to be seen.

Before the van pulled off, after the kids got off the van, about that time mountain man comes tearing out the door. Runs up to the, you know, exit door of the van, talks to the driver and then came running back. Looked like he was mad. Slammed his, you know, banged the back of the van. And, then, went away and sort of "zigged" around and ran up to the passenger door of the pickup truck and just briefly talked to them.

Now, it was very windy, so, you know, like flannel shirt and denim jacket were sort of flying open and his wild hair was flying out. And, like I say, he just talked briefly to the three people in the pickup truck and then immediately ran back to the blue car. And, the blue car had West Virginia tags. And, I though, [sic] "Oh, no. [53] Mountain man from West Virginia. West Virginia tags. This must be who he was looking for."

And, he banged on the window and there was no response. And, he, you know, jiggled the door real hard a couple of times. Nothing happened. The door didn't come open. And, the black girl inside looked kind of defensive. She kind of reached over quick as if to lock the door, I mean, sort of made that motion. And, then mountain man looked like he was really angry. And, again, jiggled the door really hard and the door came open. And, he jumped in and jumped right over against her like he was a close friend, and was talking a little bit. And, then very quickly moved back and opened the car door and motioned for the other two that were over against the wall.

They came running over. Blonde girl started . . . Now, this was a two-door car. So, he had to hold the, you know, the seat, whatever, the backrest of the seat so they could get in the back seat.

The blonde girl stepped in with her left foot in the car and all of a sudden, all of a suddent [sic] the driver, the black girl, stepped on the gas.

Okay. By this time the van and the pickup truck had gone. The pickup truck . . . the van was gone. The pickup truck had parked and the three people that were inside of

the pickup truck were walking into the Mall and [54] they were now in front of her car.

She stepped on the gas to go and rammed her car right up against the man. I have seen the man. I know exactly what he looks like. I am sure he would remember. He looked at her like she was, you know, strange, like he was wondering what was happening.

Q What was mountain man's response to this?

A Okay. As soon as Leanne, excuse me. Can I say that?

Q Well, before you go on: Did you see the black girl, the driver of the car?

A Yes. I did.

Q Let me show you Commonwealth's Exhibit Number One, the photograph of Leanne Whitlock. Do you recognize that?

A Yes. I do.

Q And where have you seen this girl before?

A I saw her in the car. She was the girl in the car.

Q This was the driver of the car?

A Yes. This was the driver. She was in the driver's seat the entire time that I saw her.

Q Also, Ann, let me show you Commonwealth's Exhibits Four and Five, photographs of a vehicle. I ask you if you recognize that vehicle?

[55] A Yes. I do. Except, when I saw it it wasn't muddy. It looked like it was brand new.

Q Okay. The license number on there; do you recognize that?

A Yes. I do. NKA-243 and later when we were going out I had my daughter write down the license plate number. And, I told her to remember, "No Kids Alone two forty-three".

Q So, this is the car and the driver that you identify as Leanne Whitlock?

A Yes. I do.

Q Going back, then, to when she stepped on the gas and the car jumped forward; what was mountain man's response to that?

A Mountain man's response was, to me, he started hitting her. He started hitting her in the shoulder. Started hitting her in the head.

Q What happened then?

A I am sorry. It is upsetting, because I witnessed violence and did nothing. Leanne was also, when she stepped on the gas she, also, was honking the horn. And, he kept hitting her and then was hitting her on the head. And she put both hands up to protect her head and that took her hands off the horn. So, she stopped honking the horn and then people sort of went their own way, like, "Well, it is okay."

[56] She stepped on the gas, also. The blonde girl who was half way in the car jumped back and I can remember her bounding on one foot to try to get her balance. She nearly fell.

Shy-guy was, at that point, behind the blonde girl not yet in the car. And, just took off like a frightened deer and ran back and stood against the wall. And, at that point . . . Okay.

At the point that Leanne put her hands up to protect her head and the horn stopped blowing mountain man waved for the two to get back in the car, and they did. They very calmly got in. The blonde girl got in first in the back seat. So, it would have been the left rear seat from where I was. I am still in the car just immediately behind them. You know, it is nearly 7:00 o'clock by now. It is dark, but it is lite up. I can see everything because it is lite up from all of the Mall lights.

So, the blonde girl got on the back seat on the left and shy-guy followed her and got in the back seat on the right. And, as he got in he handed his coat up over the seat to Strickler. And, Strickler bent over and fell on the floor . . . bent over really alot so I could barely see him. Fiddled with the coat for along time. And, while he was doing that shy-guy was sitting up and [57] blonde girl, were both sitting up on the edges of their seat kind of over just directly behind the driver. and, shy-guy had his hands up on her shoulder and arm and I mistakenly thought that was being friendly. The girl seemed kind of excited and kept bounding in her seat, like, you know. I misunderstood what was happening.

As soon as Strickler in the front seat sat up he moved, immediately, over to the middle of the seats and was facing Leanne. And, then the other two just sat back very quickly, totally relaxed and they just sat there and nothing happened.

So, I honked my horn. By that time there was no other traffic around, and it was getting late and I wanted to go. And, nothing happened. And, I said to my daughter, "Well, what is going on? What is wrong?"

So, pulled up parallel. They are here. I am here. I just pulled around them. Pulled parallel and I didn't leave enough space, only maybe eight inches between the two cars. And, I jumped out of the driver's side and my daughter was in the passenger side in the front. And, I have a little V.W. Rabbit that is pretty much the same size at that car.

I jumped around and ran around the back of my car and up to . . . I wanted to go up to talk to Leanne to say, "Are you okay?" I ran around and got to the back, [58] seat, and as soon as I did shy-guy just instinctively rolled over and hid his face down in the right-hand corner of the car and the girl started jabbing him.

And, I got up to the passenger to talk to Leanne. I knocked on the window, and she didn't look at me. And, I saw that Strickler was sitting . . . there were bucket seats and he was sitting in the middle facing her. He wasn't sitting on a seat. And, I got terrified. And, I quickly ran back. I mean, my heart just started pounding wildly. And, I got back and jumped into my car and told my daughter to duck. And, I pulled front maybe half a cars length and started trying to get Leanne's attention. I turned around like this. She would look at me. She was totally expressionless, totally frozen. and, she would look at me and I would mouth, "Are you okay?" And, she would do absolutely nothing. She made eye . . . I did that three times.

Each time she would look in my eyes totally expressionless. I am thinking like, "Go mind your own business, woman."

She would look at me and then she would look down without moving her head would look down to her right. And, I was kind of frustrated that I wasn't getting a response, so I started to pull in front a little more. And, so I thought, "No. I have got to ask one more time." So, I turned around one more time and said, "Are you okay?" [59] And, then I got a simple one word response. I did not understand what the response was, so I pulled on forward. And, what she had mouthed . . . she had just mouthed one word to me . . .

Q What did she mouth?

A She just mouthed "Help!" And, she did open her mouth quite wide to say it. At first I couldn't figure out what it was So, as I said, I pulled forward. I stopped at about Medco Drug, which is something like six to eight car lengths in front of where she was. I told my daughter "I think she said, 'Help'. Go in and get the security quickly." Well, my daughter didn't want to do that. She wanted to go home. She said, "Oh, they are okay, Mother. Don't worry so much."

I looked back and couldn't see what was happening, because at that distance there was too much darkness. And I said, "Okay. You stay here and I will run and get the security." And, I was just ready to open the door and at that time Leanne drove her car passed [sic] me.

There is a little turn. I am here in my car. She drives very, very slowly passed [sic]. Leggetts is right up here so

she makes a left to go passed [sic] Leggetts and then the street turns, the driveway turns to go passed [sic] the front of Leggetts and there is a fairly high . . . what do you call it, bump . . . the sidewalk is fairly high. [60] She had been going extremely slowly and I started to follow her. And, then it looked as if she stepped on the gas and went up over the curb. And, there was alot [sic] of carrying on.

Again, it was dark enough that I couldn't see real distinctly, but there were arms waving and flying. And, it wasn't clear to me at that point who was the drunk driver.

We followed them out to the end of the road, the street where we had to stop for the Mall driveway that comes around this way. And, on our way out there I had a little 3 x 5 card in the car. And, as I said, I told my daughter quickly to write down the license plate number NKA-243, West Virginia. She wrote on the card.

I thought, "Oh, I will just follow them." And, they turned left. And, I am sitting there noticing that my gas tank gauge was empty and I had no cash with me. And, I am thinking, "Well, I have enough gas to make it back into town." It looked as if they were going to go back into Harrisonburg.

Instead Leanne, all of a sudden switched lanes to turn right to head out 33 West . . . excuse me. 33 East toward Elkton. And, that is not an area that I am familiar with. So, I made a decision to go around to the other side of the Mall and try and call the police.

[61] So, I drove around in front of the Roth Theater and stopped in front of where they have their pay phones. And, at that point I was trying to tell myself that I shouldn't be worried. Nothing is wrong. And, I didn't know what to tell the police. So, I didn't go in. And, I drove on home.

Q The last time you saw this vehicle and all of these people was when it was going on 33 East?

A Right.

Q Ann, let me show you Commonwealth Exhibit Number Six, a photograph of the Mall; do you recognize that?

A Yes. I do.

Q And, this is 33 out here?

A Right.

MR. ERVIN: Judge, could the witness approach the jury?

THE COURT: Yes.

BY MR. ERVIN:

Q Using this photograph, where did all of this occur?

A Right here.

Q This is the entrance to the Mall?

A Right. I had parked over here and drove around here and stopped. Saw Leanne coming in here and she pulled up exactly in front of the main doors. Then when I

pulled * * * [62] Now, I couldn't tell how tightly he would have been touching her.

Q This dark-haired man; at the time was his hair long or short?

A It was fairly short.

Q Did he have a beard or facial hair?

A I am not sure. But, I don't always remember whether my husband has a beard. I think that he has just sort of a frizzly little beard.

Q And, the man that you described as "shy-guy"; is he here in the courtroom?

A I haven't looked around. Yes. Yes. He is.

Q And, where is "shy-guy" sitting?

A That is him right there.

Q This man, here?

A Yes.

MR. ERVIN: Judge, I would ask that the Record show that the witness identified the Defendant.

THE COURT: So ordered.

BY MR. ERVIN:

Q This is the man that you saw get into the car?

A Yes. It is. His hair was longer then.

Q It was longer?

A Yes. Longer than it is now.

Q And, this is the man you say took his hands and [63] put them on Leanne Whitlock after he got in the car?

A Yes.

Q Ann, this is Mr. Franklin and Mr. Ward. They may have some questions for you.

CROSS - EXAMINATION

BY MR. FRANKLIN:

Q Is this the mountain man?

A Yes. It is.

Q The man you described as being "revved-up"?

A Yes.

Q What do you mean when you say that he was "revved-up"?

A He was agitated.

Q Mad?

A I would say that he was angry at the point when he hit the van. But, otherwise, no. He was just agitated.

Q Aggressive?

A Yes.

Q Extremely aggressive?

A Yes.

Q Aggressive to the point that you described him as being "revved-up"?

A Aggressive to the point that I became fearful.

Q As a matter of fact, in some of your prior testimony, after you saw these two men in the record shop [64] you described part of it today. You heard Strickler hollering at this girl out in the Mall.

A Uh, huh.

Q And, in that testimony you said that you became frightened, yourself; is that correct? Is that a fair statement?

A Yes.

Q Frightened of Mister . . .

A I was concerned at that point.

Q Frightened of Mr. Strickler?

A Yes.

Q When you say he was hollering; how loud was he hollering?

A Very loudly.

Q Very loud?

A Uh, huh.

Q Still "revved-up"?

A Yes.

Q Had this revved-up, agitated appearance increased, stayed the same?

A I would say that it was fairly constant. And, the two years earlier when I saw him at Leggetts in the boy's

department when he came to try to return a dress with another blonde girl, he then, also, was agitated. So, it may have been a personality trait.

[65] Q You described your first confrontation with these two men in the record shop. And, you say that you backed up into Mr. Henderson, shy-guy?

A Yes.

Q And, he sort of looked at you and smiled?

A Very faintly. It was a bit cold.

Q Now, he did not exhibit, nor have you testified that he exhibited any of these revved-up characteristics at all?

A No. That is right.

Q Subdued in comparison to Strickler?

A Yes.

Q I want to make that comparison. Is that correct?

A Yes.

Q During the course of time that you were in the Mall did you see Mr. Henderson, shy-guy, talking to a girl who had a baby in a stroller?

A No. I didn't notice that.

Q You didn't notice that?

A No.

Q There was a period of time when you lost sight of them; is that correct?

A Yes. I saw them at about 6:00 o'clock and then I ran into them, again, in the center of the Mall about 6:45.

[66] Q If I understand you, when you first bumped into Mr. Henderson he was holding his coat and it was a long tan coat, or tan in color; is that the way you described it?

A I have a very vague memory of that. It was tannish, or just a very tannish-greenish kind of thing.

Q It was long? Appeared to be long? I think that is what your . . .

A Yes. That is my memory, because later in the center of the Mall he had it on.

Q When he had it on would it have come long enough . . .

A My memory is that it came down nearly to his knees.

Q Almost to his knees?

A I can't be one hundred per cent sure of that. I know that he was neatly dressed. And, I remember smelling a faintly sweet deodorant-type smell, which was very different.

Q Oh shy-guy?

A Yes.

Q You described him as "neatly dressed". How would you have compared his dress to Mr. Strickler's dress?

A Well, Strickler had a stench and clearly wasn't as neatly dressed.

Q You described Stricker as "beating on the van", [67] or the back of the truck with his fists?

A The back of the van. Not the pick-up truck.

Q It wasn't an "oh, shucks" type of thing? It was an aggressive strike; was it not?

A Yes.

Q Did it appear that even from the revved-up condition that you saw him in in the Mall, did it appear that he had become even more agitated, or even more aggressive?

A I couldn't say that for sure. Certainly, the behavior that I observed was more violent outside than inside the Mall.

Q Than inside the Mall. But, it was even bad enough in the Mall that I think you previously testified that it stopped you in your tracks?

A Stopped me in my tracks. I came up very close to him, which is how I got the stench vividly in my memory. The reason I did that was because I thought maybe I could smell alcohol on his breath, and it occurred to me that maybe he was on cocaine. But, that is the type of behavior he had. I think that his behavior in the Mall was fairly consistent with his behavior in the Mall the other time I observed him two years earlier.

Q Okay. Then, we have him beating on the back of this van. You described him as "jiggling". Before, I think, in your sworn testimony you described him as yanking [68] on the door of this blue car to get it opened; is that correct?

A Yes.

Q Well, he was kind of yanking on it with both hands.

Q Pulling on it like that?

A Right.

Q Before, in your testimony, you described the blue car as shaking he was pulling on it so violently?

A Right.

Q It was actually rocking?

A Yes.

Q He had come from nowhere to do that? He had not been standing there with shy-guy at the time; had he?

A No.

Q Shy-guy and the blonde girl were standing outside, and I believe your testimony is that he came tearing out of the Mall door straight out to the car?

A Strickler had given them orders to meet him at the Mall entrance. And, Stricker had said, "I need to get out of here."

Q You say Strickler gave them orders. There was no question about the fact that Strickler was in charge here?

A Clear. Strickler was the lead man. The girl [69] just watched him. And, shy-guy hung in . . . In the times that I observed him, kind of hung back.

Q Okay. And, Strickler was the one who was calling the shots, at least there in the Mall. No question about that?

A The times that I observed them. Yes.

Q Okay. He rips the door open and slides in over against Leanne Whitlock?

A Yes. Facing her.

Q And, then, does this motioning the blonde girl and shy-guy: Come out. And, then she gives it gas. They jumped back. And, as I think you described Henderson, he looked like a frightened deer and he ran back to the Mall; is that correct?

A Well, he ran back . . . Instead of against the wall where he had been initially.

Q So, it is at this point that Strickler starts striking Leanne?

A Right.

Q Repeatedly?

A Right. Yes.

Q About the face and about the head?

A Yes.

Q Mr. Henderson had no part of that? He wasn't even in the car?

[70] A No. He was standing and watching against the wall.

Q He then gets her to put her hands up like that. Motions to them and they get back in the car and then you described what happens afterwards.

A Yes.

Q In the course of all of your observations did you come face-to-face with Mr. Strickler so that you could describe to the jury his eyes?

A (No response.)

Q Would it be fair to say that they were "wild" in appearance?

A Those wouldn't be my words. They were not even terribly blood-shot, but appeared to slightly blood-shot as if he hadn't slept for a while.

Q Okay. After this whole ordeal that you have described here was over, Mrs. Stolzfus, you never did report it to the police; did you?

A No, because at the point that I made the decision not to call the police that I had convinced myself that what I saw was just a normal occurrence.

Q At that time you were living in the Harrisonburg area; were you not?

A Yes.

Q You heard reports that there was a JMU Student [71] missing; did you not?

A Well, to be truthful, my daughter just came back from France. We went to the airport to pick her up. Have her Christmas, and I was pretty much isolated from the world. Went to JMU Monday to get my schedule and classes lined up and classes started Tuesday. I learned of it by word-of-mouth. My memory, then, was that it was about Thursday of that week that I went back out to the Mall shopping and learned it from a clerk at the Mall.

Q But, even, then you didn't report it to the police; did you?

A I had nothing, sir, to report to the police, because I made no association at the time. I heard at the Mall that a black girl had been abducted from the Mall, from inside the Mall, sometime that Friday Evening. I remember going carefully going in my memory over everywhere I had been inside of the Mall and I had not remembered seeing a single, solitary black girl from inside of the Mall. And, so, I dismissed it from my mind at that point.

Q Mrs. Stolzfus, after describing to this jury, having to stop in your description of what you saw, you tell this jury . . . under oath . . . that you did not make that association?

A Absolutely. It is very easy to understand, I think. I didn't have access at that point. I had [72] not seen this on t.v. I had not read the newspaper, as I typically do. I was extremely busy that week. I am the mother of four children. I was a full-time student. We just had a family Christmas. I wasn't worried about local news.

Q Mrs. Stolzfus, immediately after you described what you saw in the Mall to some students at JMU they put the Harrisonburg Police in touch with you; didn't they? And, the Harrisonburg Police came to interview you; did they not?

A Okay. It is not quite that simple, sir. Tuesday of the following week . . . Now, I went a whole week and made no association, whatsoever. That Friday I learned that the car had been found. Around Saturday of that week, in other words, eight days after I had been at the

Mall I learned that Leanne's body had been found. I learned that, again, from someone at the Mall. I had gone to the Mall Friday Night. Discussed it with a clerk there. At that point I made absolutely no association.

Tuesday in a class I was talking with a group of black students who happened to be in that class, who happened to have been friends of Leanne's and everyone was tearful and upset. And, I learned a lot of details. I learned a lot of details about what happened. And, on some level . . . I will say . . . on some level I was starting [73] to become uneasy.

The following day . . .

Q What details did you learn that you didn't already have, Mrs. Stolzfus?

A Well, one detail was that she was abducted in a car. And, as soon as I learned that it wasn't a girl taken from inside of the Mall . . .

Q Let me just interrupt you there. Who told you that she was abducted in a car? You are the one who provided that information, Mrs. Stolzfus. Who told you that she was abducted in a car?

A Okay. The girls in my class. That was a conclusion that the kids at JMU had made, because she had been seen before she left for the Mall and that is the last that she had been seen. And, because the car had been found then they knew that she had been taken in her boyfriend's car. So, that was a conclusion that people made. That was speculation . . . purely speculation that maybe she hadn't made it inside of the Mall afterall.

Q But, that was one that you couldn't have made earlier?

A No, sir. Not from the information, or the lack of information that I had. I will say the first time . . . If you want to understand the psychology of how my mind worked in this . . . and obviously, on some level I was upset. [74] Monday Morning . . .

Q Mrs. Stolzfus, I want to ask you the psychology of how this was such a traumatic experience that you drove around to use the phone to call the police and yet when you learned of all of this you didn't make the association for ten days later? I want to understand that psychology.

A That is not too hard to understand, if you understand that women have feelings and often their husbands tell them that they should use their rational facilities. My feelings told me one thing, and my mind told me something else. I listened to my mind.

As I drove away from the Mall that night after I had decided not to call the police, after my mind told me that I was crazy and imagining things, et cetera, et cetera, I broke down and cried on the way home. I said to myself, "I don't understand why I am so upset. I don't understand why I was so afraid."

Okay. And, you must understand that on some level I did not ever want to believe that that was what I saw.

Monday, a week after, January 15th, something like that, I went out to my car. Cleaned out my car. And, as hard as this may be for you to believe, I came across this little piece of trash. The 3 X 5 index card that said, "West

Virginia, NKA-243" and I go, "what is [75] this?" I could not remember what in the world that was for. It was written in pencil in my daughter's handwriting. I figured that it was a piece of scrap paper. I threw it away. I had a large trash bag. I threw it in the bottom of the trash bag. And, as I threw it in through my mind went the thought, the police won't find it there. I go, "Oh, my God! I am getting paranoid." Then I dismissed the thought. So, on some level I was emotionally blocking it.

The very next day I went to class. Learned more details about the case. The following day I went to the same class. Talked to Kim Davis and asked her, "What did the car look like? Was it dark blue?"

Before I did that. That was Wednesday. Wednesday Morning I came back between . . .

Q Thank you. Thank you, Mrs. Stolzfus.

MR. FRANKLIN: Judge, I have no further questions.

THE COURT: Redirect?

MR. ERVIN: No, sir. No further questions at this time.

* * *

September 17, 1997, Attachments to Petitioner's Supplemental Memorandum in Further Support of Motion For Summary Judgment

Case No. 3:95-CV-924

United States District Court

Eastern District of Virginia

9-08-97

Response to Interrogatories from Capt. D. L. Claytor

(Q)1. State whether the handwritten notes of the January 19, 1990, interview of Anne Stoltzfus (Exhibit #1) were written by then Det. Claytor. If not, state who prepared the notes. State to whom the document was distributed an [sic] when.

(A)1. Notes were written by D. L. Claytor, Document distributed to Virginia Capital Representation Center, Counsel for Tommy David Strickler, under Subpoena of the U.S. District Court.

(Q)2. Det. D. L. Claytor prepared typed reports of his interviews with Anne Stoltzfus on January 19, 22, 24, 25 and February 1, 1990. See Exhibit 2 (6 pages) State to whom Det Claytor distributed this report and when.

(A)2. Report distributed to the Commonwealth Attorney of Rockingham County, Date Unknown, and the Capital Representation Resource Center.

(Q)3. Exhibit 3 (two pages) is entitled "observations" and is dated 1-19-90 1:00 PM in the upper left hand corner. State:

a) who prepared this document

b) state when it was received by Det. Claytor

c) state to who Det Claytor distributed this document and when

(A)3.a) Document was given to Det. Claytor by Anne Stoltzfus

b) Received by Det. Claytor 1-19-90 1:00 PM

c) Do not recall except for Capital Representation Resource Center

(Q)4. Exhibit 4 (3 pages) is typed letter dated January 22, 1990, to Sergeant Claytor signed by Anne Stoltzfus. State to whom Det Claytor distributed this document and when.

(A)4. Do not recall except for Capital Representation Resource Center

(Q)5. Exhibit 5 (1 page) is a typed document entitled "Notes for Det. Claytor: My Impressions of The Car (Anne Stoltzfus) State:

a) when Det Claytor received this document, and

b) to whom Det Claytor distributed this document and when.

(A)5.a) Do not recall

(A)5.b) Do not recall except for Capital Representation Resource Center

(Q)6. Exhibit 6 (1 page) is a handwritten note dated 1-25-90 1:45 AM to Det Claytor and signed Anne Stoltzfus. State to whom Det Claytor distributed this document and when.

(A)6. Do not recall except for Capital Representation Resource Center

(Q)7. Exhibit 7 (2 pages) is a typed letter dated January 26, 1990, to "Dear Detective Claytor" and signed Anne Stoltzfus. State to whom Det. Claytor distributed this document and when.

(A)7. Do not recall except for Capital Representation Resource Center.

(Q)8. Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus, entitled "Details of encounter with Mountain Man. Shy Guy & Blonde Girl." State:

a) when this document was received, and

b) to whom Det. Claytor distributed this document and when

(A)8.a) Do not recall

b) Do not recall except for Capital Representation Resource Center

(Q)9. State how Det. Claytor first learned that Anne Stoltzfus had information concerning the Whitlock Case.

(A)9. Do not recall

(Q)10. State whether notes or interview reports were prepared concerning the source identified in 9 above.

(A)10. Interview report of Anne Stoltzfus

(Q)11. State whether Det Claytor spoke to or interviewed the source identified in 9 abov(

(A)11. Interviewed Anne Stoltzfus

Respectfully submitted.

/s/ D. L. Claytor
Captain D. L. Claytor

COMMONWEALTH/STATE OF VIRGINIA

ACKNOWLEDGED AND SWORN TO BEFORE ME THIS 8th DAY OF September 1997.

/s/ Sarah L. Fairweather
NOTARY PUBLIC

MY COMMISSION EXPIRES: 3-31-99

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER
Petitioner.

Civil Action No.
3:95CV924

v.

J. D. NETHERLAND, WARDEN,

Respondent.

A. LEE ERVIN, UNDER OATH SAYS:

1. State whether you reviewed the handwritten notes of the January 19, 1990, interview of Anne Stoltzfus, see Exhibit 1, prior to or during Strickler's capital trial. State when you first reviewed these notes.

ANSWER: I do not remember seeing the handwritten notes, Exhibit 1, prior to or during Strickler's trial.

2. Det. D. L. Claytor prepared typed reports of his interviews with Anne Stoltzfus on January 19, 22, 24, 25, and February 1, 1990. See Exhibit 2 (6 pages). State whether you reviewed these reports prior to or during Strickler's capital trial. State when you first reviewed these reports.

ANSWER: Yes. These reports, Exhibit 2, were reviewed by me prior to Strickler's capital trial, but I do not remember the exact date I first reviewed them.

3. Exhibit 3 (two pages) is entitled "Observations" and is dated "1-19-90 1:00 p.m." in the upper left hand corner. State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 3, dated 1-19-90, prior to or during Strickler's trial.

4. Exhibit 4 (3 pages) is a typed letter dated January 22, 1990, to "Sargeant Claytor" signed by Anne Stoltzfus. State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 4, dated January 22, 1990, prior to or during Strickler's trial.

5. Exhibit 5 (1 page) is a typed document entitled "Notes for Detective Claytor: My Impressions of 'The Car' (Anne Stoltzfus)." State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 5 prior to or during Strickler's trial.

6. Exhibit 6 (1 page) is a handwritten note dated "1-25-90 1:45 a.m." to "Detective Claytor" and signed "Anne Stoltzfus." State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: I do not remember seeing Exhibit 6 prior to or during Strickler's trial.

7. Exhibit 7 (2 pages) is a typed letter dated January 26, 1990, to "Dear Detective Claytor" and signed by Anne Stoltzfus. State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: Yes. This letter was reviewed by me prior to Strickler's capital trial, but I do not remember the exact date I first reviewed it.

8. Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus, entitled "Details of Encounter with Mountain Main, [sic] Shy Guy & Blonde Girl." State whether you reviewed this document prior to or during Strickler's capital trial. State when you first reviewed this document.

ANSWER: Yes. I did review Exhibit 8 prior to Strickler's capital trial, but I do not remember the exact date I first reviewed it.

9. State who first informed investigators that Anne Stoltzfus had information concerning the Whitlock case.

ANSWER: I do not personally know who first informed investigators that Anne Stoltzfus had information concerning the Whitlock case.

10. State whether notes or interview reports were prepared concerning the source identified in 9 above. Who is the current custodian of those notes or reports?

ANSWER: I do not know.

11. State whether you spoke to or interviewed the source identified in 9 above and the date.

ANSWER: To the best of my knowledge, I did not speak to or interview the source identified in 9 above.

12. State what materials, if any, were disclosed by you to Strickler's defense counsel pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

ANSWER: I disclosed my entire prosecution file to Strickler's defense counsel prior to Strickler's trial by allowing him to inspect my entire prosecution file including, but not limited to, all police reports in the file and all witness statements in the file. I was in possession of Exhibits #2, #7, and #8 prior to Strickler's trial and they were part of my prosecution file which was made available to defense counsel for his inspection.

/s/ A. Lee Ervin
A. Lee Ervin

Subscribed to and sworn before me, a Notary Public, this 9th day of September, 1997.

/s/ Patty B. Campbell
Notary Public

My commission expires: August 31, 1999

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

TOMMY DAVID STRICKLER Petitioner.	Civil Action No. 3:95CV924

v.

J. D. NETHERLAND, WARDEN,
Respondent.

STATE OF VIRGINIA
CITY OF STAUNTON

AFFIDAVIT OF THOMAS S. ASHBY

Thomas S. Ashby, having been duly sworn, states that:

1. During 1990 I was an employee of the Office of the Public Defender for the City of Staunton and Augusta County. I held the position of investigator. In that capacity I assisted William Bobbitt, Jr., the Public Defender, in his representation of Tommy David Strickler who was

charged with capital murder and related offenses arising from the murder of Leeann [sic] Whitlock.

2. In May, 1990, the Commonwealth filed a list of its witnesses with the Clerk of the Augusta County Circuit Court and requested that the witnesses be summoned for Strickler's trial.

3. To the best of my memory, sometime prior to Strickler's trial on June 18, 1990, I contacted Anne Stoltzfus, a Commonwealth's witness, by telephone. I told Stoltzfus that I wanted to speak with her about the Whitlock murder. Stoltzfus asked me who I was working for, and when I informed her that I was in investigator for the defense, she refused to speak with me.

/s/ Thomas S. Ashby
Thomas S. Ashby

Sworn to before me this 11th day
of September, 1997.

/s/ Linda H. Major
Linda H. Major, Notary Public

My commission expires: July 31, 2001.

September 25, 1997, Attachments to Warden's Supplemental Memorandum In Support of Cross-Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Caption Omitted In Printing]

AFFIDAVIT

Thomas E. Roberts, first being duly sworn, says:

In 1990, I assisted William E. Bobbitt, Jr., in the trial of Thomas David Strickler. I have reviewed the attached documents and although I cannot recall if I have seen these specific documents, I do remember the information contained in them. I remember discussing with Mr. Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time. It seemed too good to be true. The attached newspaper article is somewhat familiar. To the best of my recollection, we were concerned that Strickler had talked to a reporter without our knowledge or permission. It appears obvious that the witness quoted in the article is Ms. Stoltzfus.

I would be willing to testify to the above at the hearing scheduled for October 1 & 2, 1997 in the U.S. District Court at Richmond, Va. However, I am planning to be in Florida on a long-scheduled trip with my wife during that time.

/s/ Thomas E. Roberts
Thomas E. Roberts

City of Staunton
Commonwealth of Virginia

Subscribed and sworn to before me on September 25, 1997,

/s/ Illegible.
Norary [sic] Public

My commission expires
May 31, 1999.

[SEAL]

ROANOKE TIMES & WORLD-NEWS
Copyright (c) 1990, Roanoke Times & World-News

DATE: Sunday, June 17, 1990
SECTION: NATL/INTL
SOURCE: MARK MORRISON
STAFF WRITER

TAG: 9006170257
PAGE: A1 EDITION: METRO

SLAIN STUDENT'S ABDUCTION DESCRIBED
'I FIGURED IT MUST BE A DOMESTIC DISPUTE'

Leann Whitlock was smiling and singing out load to herself as she drove into the parking lot of a Harrisonburg mall the night she was killed, a witness to her kidnapping says.

The look on Whitlock's face changed to one of terror moments later, the witness says, after a man forced his way into the car, punched her several times and let two other people pile into the back seat.

Whitlock, a James Madison University sophomore from Roanoke, was taken from the mall to a wooded area

about 30 miles away. There, she was robbed, stripped and beaten on the head with a rock.

Whitlock's body was buried in the woods under branches and debris, where it remained undetected in the January cold for more than a week.

By the time her body was discovered, Tommy David Strickler was already in custody as a suspect in her disappearance, and authorities were looking for a second suspect, Ronald Lee Henderson.

Strickler, 24, of New Market, goes on trial Monday in Staunton on a capital murder charge. If convicted, he could be executed. Henderson, also charged with capital murder, remains at large.

A third person, Donna Kay Maddox Tudor, faces grand larceny charges in the theft of the car, which belonged to Whitlock's boyfriend. She is free on bond and is expected to testify in Strickler's trial.

Tudor was with both men at Harrisonburg's Valley Mall the night Whitlock was kidnapped, according to the witness who saw the abduction. The witness asked not to be identified before the trial.

Her testimony is expected to be a key part of the prosecution's case. Commonwealth's Attorney A. Lee Ervin summoned more than 30 witnesses for the trial, which may last a week.

The witness, who was shopping with her 14-year-old daughter, said she encountered Strickler, Henderson and Tudor in the mall about 6:45 p.m. on Jan. 5.

Because she didn't know their names when she told police what happened, she said she referred to the three as "Mountain Man," "Shy Guy" and "Blondie." She later identified Strickler, Henderson and Tudor from police mug shots, she said.

The woman said Strickler was shouting, "Donna! Donna!" at Tudor, who was walking ahead of him with Henderson.

Tudor finally stopped and the woman said she overheard Strickler say, "I've got to get out of here." He told them to go outside and wait for him at the bus stop.

The woman and her daughter were in their car about to leave the mall a little later when Whitlock drove past. She said Whitlock was singing loudly and smiling.

The woman pulled out behind Whitlock, who was following a pickup truck. Near a mall entrance, the truck stopped, forcing Whitlock and the woman to stop.

A man rushed up to Whitlock's car from the mall and started pounding on the passenger-side window and pulling at the door handle, the woman said.

She said she saw Whitlock lean over as if she was trying to lock or unlock the door, but the door popped open and the man climbed in. He sat between the two front seats, right next to Whitlock.

The man punched Whitlock several times in the head, then motioned to another man and a woman standing nearby, the witness said.

"I figured it must be a domestic dispute," she said.

When the pickup ahead of Whitlock moved Whitlock, blowing the car horn, stepped on the gas. But she was forced to stop again for pedestrians who were walking across her path.

"At least a dozen people stopped and looked," the witness said. "Nobody did anything. I think everybody though it was just a bunch of college kids carrying on."

It seemed odd, she said. "Mountain Man didn't look like he would go with her, but the license plates were from West Virginia and he looked like he might be from West Virginia."

Whitlock was stopped long enough the second time for the man and woman to get in the car.

Meanwhile, the witness pulled up beside the car.

"I was trying to get her attention," she said. "She just sat there frozen, like she was a mannequin. I couldn't get her to look at me."

She moved forward a few more feet to be in better line with Whitlock's field of vision and said they made eye contact.

"I mouthed to her three times, 'Are you OK?' " the woman said.

Whitlock did not respond. "She was just so totally frozen in her appearance. But she met my eyes and then looked down to her right side.

"I was frustrated because I thought she was ignoring me," she said. "I didn't have a clear idea if she was OK or not. I couldn't figure out what was going on.

"When someone isn't responsive and ignores you, I think sometimes they're telling you to bug off. I wonder now what she was trying to communicate to me by looking down with her eyes."

The woman said she was about to drive off but asked one more time if Whitlock was all right.

"She mouthed back one word and she was totally expressionless," the woman said, but she couldn't make out immediately what the response was. The woman then drove past Whitlock about 15 yards and stopped again.

"I told my daughter she said, 'Help.' She mouthed help."

Just then, the woman said, Whitlock and her three passengers drove by picking up speed, hopping a curb with one tire.

The woman decided to follow the car. Whitlock turned onto U.S. 33 east toward Elkton. The woman said she was not sure how far she should follow. It was dark, her car was nearly out of gas, and Elkton was unfamiliar territory. And, she had a husband and three more children at home waiting on dinner.

She went home, but didn't call the police.

"What was I going to tell them? I had a lot of bad vibes, but I didn't have anything concrete," she said. "My thinking was, maybe they're just a bunch of college kids out drinking.

"Now, of course, I feel terrible that I didn't do anything, but you see a lot of crazy things."

The witness didn't come forward until 12 days later, when she told her story to Kim Davis, a friend of Whitlock's at JMU.

"Everybody on campus was talking about Leann, but I still didn't think anything about it," the woman, who attended JMU last semester, said. "I just couldn't make myself believe that what I saw had anything to do with her death."

Davis called the Harrisonburg Police Department, and the next day, Investigator D.L. Claytor questioned the woman about the kidnapping and showed her photographs of suspects.

"Mountain Man, I identified him right away," the woman said. "I could pick him out of a million."

Later, she called John Dean, Whitlock's boyfriend and the owner of the car Whitlock drove, and asked if he would meet her and show her photographs of Whitlock. She said she wanted to verify for herself that it was Whitlock she had seen.

"I feel really bad that I didn't call the police. I mean, it might have saved her life, I can't apologize to her family and friends enough."

About 45 minutes after Whitlock was kidnapped, another witness said he saw Strickler, driving Dean's car, turn onto the dirt road in Augusta County near where Whitlock's body was found.

Kurt Massie of McKinley said Strickler was in the car with either two or three other people. It looked like a blonde woman was in the passenger seat and a man was sitting in the back, he said.

He thought he saw a fourth person hunched down in the back seat, but he said he wasn't sure.

Massie said he got a good look at only Strickler, taking notice of him because he l[illegible]oked somewhat like Massie's brother and because his abrupt turn onto the road almost caused a wreck.

"There was no doubt about it," Massie said. "It was him. He turned and looked right at me."

He said he later identified Strickler in a police lineup at the Augusta County Jail, where Strickler is being held.

Strickler, Henderson and Tudor were next seen about 9 that night at Dice's Inn, a Staunton nightclub, according to other witnesses.

Nancy Simmons had gone there that Friday night with two friends and met "Stoney," as she said Strickler called himself, and Henderson shortly before the band came on. She said Tudor had arrived at the bar earlier.

"I hate to say it, but they acted like gentlemen. At the end of the night, Ron even kissed my hand. I couldn't believe that," she said.

Simmons and her friends danced with them, and she said at one point someone urged Strickler to "Get down." He responded by dropping to the floor and doing push-ups.

Simmons said she talked more with Henderson, who told her he used to ride with the Pagan motorcycle gang. He also had a prominent scar on his arm that he said was from a gunshot wound received in a family feud.

Back on the dance floor, he gave her a woman's silver Timex watch that he said was his ex-wife's. She said Henderson told her he also had a ring and something else to give away.

"He wanted to get rid of them because it was like getting rid of the memories," she said.

Simmons put the watch in her pocket at first, but later tried it on. That's when Henderson kissed her hand and told her the watch was a perfect fit, she said.

"It felt strange. I don't know why someone would give me a watch."

Investigators have confiscated the watch; they would not confirm whether it belonged to Whitlock.

Harry Dice, the owner of Dice's Inn, remembered Strickler being at the club that night because Strickler asked to use a kitchen knife to fix a broken necklace.

Simmons said Strickler, Henderson and Tudor left the bar together about 2 a.m.

The following day, they were seen driving Dean's car in the New Market area, according to New Market Police Chief Houston Toman. Police say Henderson also visited Strickler's home east of New Market, where Strickler had been living on and off with his mother and stepfather.

There, Henderson told the parents that he was looking for Strickler because their son had stolen a car belonging to his cousin, said Irene Silvious, Strickler's mother.

She said Henderson changed into a pair of her son's blue jeans, which had been stashed in a junked car on the

property. They argued and he fled, Silvious said, leaving his old clothes behind. The clothes also have been confiscated by investigators.

Strickler and Tudor, meanwhile, had taken Dean's car to Virginia Beach.

In an interview form jail, Strickler acknowledged he and Tudor went to the beach in Dean's car. He denied any involvement in Whitlock's kidnapping or murder, however.

Strickler contends prosecutors are trying to convict him to save face for not catching Henderson.

"All the commonwealth is looking at is that the girl's dead," he said. "They've got me and due to the fact that I was seen in the car, they think I'm the one. I was in the car – I can't deny that – but I wasn't in the car with the girl."

His version of the story is that he was hitchhiking north along U.S. 11 between Harrisonburg and New Market when Henderson picked him up in Dean's car on Jan. 5. They knew each other from parties, but were not good friends, he said.

That night the two of them met Tudor at Dice's Inn in Staunton. Strickler said he had not known her before.

Strickler and Tudor drove to Virginia Beach the next day, after Henderson let them borrow the car. But Henderson told them that he had to return the car to West Virginia the following Friday, Strickler said.

Three days later, Strickler said, he found identification belonging to Whitlock in the car's glove compartment. He said that made him suspicious.

Several months after Whitlock was killed, her parents, Ed and Esther Whitlock, received a credit-card bill in Leann's name. The charges came from Virginia Beach.

A ninth-grade dropout who has worked odd jobs since leaving school, Strickler has been described by police as a drifter, a label he contends isn't fair.

"I don't know why they call me that. I guess because I don't stay in one place," he said. "But a drifter to me is somebody who has nothing. I always knew someone, always had a place to stay.

"I've gone out of my way a million times to help people," he said. "At Christmas time, if I see a bum on the street, I've given them money or food. . . . I'll give them my coat. I'd give them the clothes off my back."

Despite undergoing two psychological examinations recently to determine if he suffers from brain damage, Strickler maintained he will not use insanity as a defense.

He plans to plead not guilty, and promised no plea agreements.

Strickler said he opposes the death penalty, and will appeal if convicted.

"Nobody has the right to kill another person. The only person who can make that decision is God," he said. "I'm not in favor of nobody taking nobody's life."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER, Petitioner, v. J.D. NETHERLAND, WARDEN, Respondent.	)	Civil Action No. 3:95CV924

FINAL ORDER

(Filed Oct. 15, 1997)

For the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that Petitioner's Motion For Summary Judgment On Claim J (*Brady* violation) And Claim U (denial of fair trial) is GRANTED, thereby nullifying Petitioner's convictions of September 19, 1990 and the sentences imposed thereon. Respondent's Motion for Summary Judgment is DENIED.

Let the Clerk send copies of this Order and accompanying Memorandum to all counsel of record.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

OCT. 15, 1997
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,	)	
	)	
Petitioner,	)	**Civil Action**
	)	**No. 3:95CV924**
v.	)	
	)	
J.D. NETHERLAND, WARDEN,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION
(Filed Oct. 15, 1997)

The crime giving rise to the instant proceedings occurred on January 5, 1990. The evidence at trial, in a brief summary, was as follows:

> The victim, Leanne Whitlock, a young woman, while driving a friend's automobile, had driven to a shopping mall in Harrisonburg, Virginia at approximately 6:45 p.m. While the vehicle was stopped, a man ran from the shopping section of the mall and forced his way into the vehicle which the victim was operating. She drove off an [sic] sounded blasts of the horn while the intruder struck her repeatedly. She stopped the vehicle, and a second man, accompanied by a blond-haired woman, allegedly entered the car. Ms. Whitlock drove the car away, and her nude body was discovered five or six days later.

The issue before the Court deals primarily with the predicate acts leading to the death sentence rendered against the Petitioner.

By agreement of Counsel for the Petitioner and Counsel for the Respondent, the issue of ineffective counsel, as contended in Claim B of the Amended Petition, has been withdrawn, leaving for the Court's determination, on the agreed pleadings, the claims in Claims J and U described in the following paragraphs.

On September 19, 1990, the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254, Strickler filed a Petition and an Amended Petition seeking a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. The matter comes before the Court on the cross-motions of Petitioner and Respondent for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motions have been fully briefed by the parties and are ripe for decision.

BACKGROUND

Charges against Strickler were first brought in Rockingham County in January 1990, and the case was later transferred to Augusta County when a capital indictment was returned in April, 1990. Strickler was tried by a jury before the Circuit Court of Augusta County (J. Wood) and found guilty of capital murder, robbery, and abduction. On June 21, 1990, the jury recommended two life terms on the robbery and abduction charges and death for the capital murder charge. On September 19, 1990, the judge followed the recommendation of the jury sentence in the sentencing hearing.

By Orders dated December 10, 1996 and January 16, 1997, for reasons set out in Memoranda of the same dates, the Court granted Strickler an evidentiary hearing on Claim B alleging ineffective assistance of trial counsel, on Claim J alleging that the Commonwealth withheld exculpatory and impeachment material ("Brady" material) on a chief prosecution witness, Ann Stoltzfus, and on Claim U alleging that the cumulative effect of constitutional errors at trial violated Strickler's right to a fair trial.

STANDARD

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Allstate Fin. Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir. 1991). The moving party has the initial burden of establishing the absence of a genuine issue of fact.[1] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

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[1] "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross Communications v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Where no genuine issue of material fact exists, the Fourth Circuit has imposed an obligation on the trial judge "to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255; *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1004 (4th Cir. 1987).

Once the movant has met this burden, and a properly supported motion is before the Court, the non-moving party must set forth specific facts showing that there is a genuine issue for trial in order to defeat the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Allstate*, 934 F.2d at 58. Summary judgment is proper if, based on the evidence, "a reasonable jury could [not] return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248; *Allstate*, 934 F.2d at 58.

ANALYSIS

Pursuant to a subpoena obtained by Petitioner to develop his federal habeas case, Strickler obtained copies of Detective Claytor's notes and interview reports as well as copies of materials sent to the Detective by Anne Stoltzfus. Early in the investigation, Claytor conducted several interviews with Stoltzfus. Claytor took notes of those interviews, prepared formal reports of the interviews, and received letters and notes from Stoltzfus. *See* Claytor's Response (4/22/97), Attachment 1 to Motion

for Summary Judgment. These materials are referred to herein as "the Stoltzfus materials."[2] Stoltzfus subsequently testified at Strickler's June 1990 trial that she had witnessed the abduction of the victim, Whitlock, from a Harrisonburg shopping mall. According to the prosecutor, Stoltzfus was the only eyewitness to the alleged abduction.

Exculpatory and Impeachment Material in the Stoltzfus Materials

The notes, letters, and interviews of Stoltzfus contradicted or impeached her trial testimony in many crucial respects. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman that she said she saw in the car at the time of the alleged abduction, and Stoltzfus provided no description of the woman's clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this fact is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [the victim's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as appearing to be "a rich college kid," "singing" and

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[2] The documents at issue ("the Stoltzfus materials") are attached as Exhibits 1-8 to the affidavits of William Bobbitt and Humes Franklin filed with Petitioner's Summary Judgment Motion.

"happy." Transcript of June 18 – 21, 1990 Trial ("Tr.") 483. Stoltzfus described the clothing Whitlock was wearing. These inconsistencies were extremely material for cross-examination.

When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could *not* positively identify Strickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr. 501. Stoltzfus was also unable to make a positive identification of Henderson (said to have been with Strickler at the time of the alleged abduction) from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews appear to have been contradictory to this testimony.

In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She also gave a detailed description of

the physical features and clothing of the white woman allegedly accompanying them. Ex. 7.

Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me job [sic] my memory.

Not only does this letter provide impeachment material, it provides a basis for which Stoltzfus's testimony might have been excluded altogether. She admits that she did not recall being at the mall on January 5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor information that never appeared in any of his notes, i.e., that she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information, at a minimum, would likely have been extremely valuable in attacking her credibility with the jury, if counsel were not successful in actually barring her testimony altogether.

Claytor's handwritten notes of January 19, 1990 contain no mention of Stoltzfus's described encounter with Strickler and Henderson in a music store in the mall. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and a white woman

inside the mall. The woman, according to the report, bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her alleged encounter in a music store with Strickler and Henderson. Stoltzfus subsequently gave this testimony at trial. In the January 22 letter, Stoltzfus stated she was uncertain that the man she saw in the mall was even the same man that she later testified she saw approach Whitlock's car. ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> *I have a very vague memory that I'm not sure of.* It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? *Were those 2 memories the same person?*

(emphasis added). The letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm *thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases.* Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(emphasis added). Once again Stoltzfus appeared to have admitted that she had not remembered being in the mall that night. Her "memory" appears to be based on what her daughter had told her.

A letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> *Thank you for your patience with my sometimes muddled memories.* I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm not sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, *I never would have made any of the associations that you helped me make.*

(emphasis added). Stoltzfus' memory of the events to which she testified appears to be muddled at best. Strickler likely could have utilized that in an effort to convince the jury that Stoltzfus' story was concocted with the assistance of the police, after viewing the evidence and photographs, after hearing discussions of the crime on campus, and perhaps influenced by the pervasive news coverage of Whitlock's murder. As the Supreme Court has noted, the evolution of a witness' description over a period of time can be fatal to its reliability. *See Kyles v. Whitley,* 514 U.S. 419, 444 (1995).

A plethora of additional impeachment material is contained in the Stoltzfus materials which is not set forth

here. The Court has discussed herein several of the documents that appear to be genuinely in dispute (Exhibits 2, 7, and 8) because it is necessary to refer to them to point out contradictions with Stoltzfus' other statements in the documents about which there is no genuine material dispute (Exhibits 1 and 3-6). However, even if the three documents that are in dispute were provided to Strickler's trial counsel, the other five documents that are not in dispute in the Court's view are sufficient to constitute a *Brady* violation and support the instant motion for summary judgment. The five documents containing the Stoltzfus' letters and notes to Det. Claytor provided potentially devastating impeachment material, casting doubt on her testimony.

Materiality of the Stoltzfus Materials

Respondent argues unsuccessfully that the suppressed documents were not "material" under *Brady* and therefore, the prosecutor had no obligation to disclose them to defense counsel. The Commonwealth's Attorney's argument on summation at Strickler's trial refutes this. The prosecutor argued that Stoltzfus' testimony established both the abduction predicate and the armed robbery predicate for the capital murder count:

> First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfus [sic] says that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then drove off with Ms. Whitlock. She was

> brought here to Augusta County where she was detailed, where she was taken by abduction. Absolutely no issue about that.

Tr. at 794.

* * *

> And we are lucky enough to have an eyewitness who saw what happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stoltzfus was there, she saw what happened.

Tr. at 799. The Commonwealth's Attorney then repeated Stoltzfus' testimony in detail. (Tr. 799-801). He argued to the jury based on Stoltzfus' testimony that Strickler had a knife and that he held it against Whitlock as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him al [sic] the time. He had a knife later on with him in the car. *That was pressed right up against Leanne.* . . . Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

Tr. 800-01 (emphasis added).

Stoltzfus described Strickler alone as committing violent acts against Whitlock – he forced his way into her car

and struck her repeatedly. In this way, the Commonwealth's Attorney used Stoltzfus to prove that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. No other witness placed Strickler in the vicinity of Whitlock, her car, or the parking lot during the time period in which Whitlock was believed to have been at the mall. Despite widespread publicity about Whitlock's case, no other witness came forward to report the very public events that Stoltzfus claims to have witnessed. Stoltzfus was the critical witness on the abduction count.

Likewise, no other witness saw Strickler with a knife or any other weapon when at the mall. Stoltzfus herself never testified that Strickler had a knife when he was in the mall or allegedly in the car with Whitlock. That inference was provided by the prosecutor based on Stoltzfus' claim that Whitlock looked down while Strickler sat beside her in the car. Again, Stoltzfus was the critical witness for the armed robbery predicate based on what she "observed" in the parking lot. Thus, as the Commonwealth's Attorney recognized, Stoltzfus's testimony played a central role in Strickler's conviction and portrayed Strickler, rather than Henderson, as the leader and instigator in the violent abduction and robbery. Without Stoltzfus' testimony, which appears likely to be less certain than she portrayed, the jury may well have been reduced to speculation concerning these events and concerning the role played by Strickler. The jury could have found Henderson as the leader and instigator instead of Strickler.

Respondent relies on evidence that Strickler had Whitlock's car and possessions sometime after Stoltzfus

"witnessed" the alleged abduction and armed robbery to establish that the suppressed *Brady* materials could not undermine confidence in the outcome of the trial. This argument ignores substantial evidence that could have led a jury to believe that Henderson, rather than Strickler, was the ring-leader in Whitlock's abduction, robbery, and death. Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans.[3] Thus, Stoltzfus' testimony was not irrelevant to Strickler's conviction as Respondent maintains.

Without Stoltzfus' testimony, the jury could have concluded that Henderson was responsible for the abduction, robbery, and murder, and that Strickler was an accessory after the fact or a principal in the second degree but not a principal in the first degree to capital murder. The court had charged the jury on the offense of first degree murder. Conviction of a lesser offense was a reasonable probability if defense counsel had been given the Stoltzfus materials. Given that Stoltzfus initially did not even remember being at the mall on the night Whitlock was abducted, was later unsure whether the man she saw

[3] At Henderson's trial, the Commonwealth called this friend as its own witness to establish Henderson's guilt.

in the mall was the same one who approached Whitlock's car, and the large amount of impeachment material contained in the Stoltzfus materials, Strickler has satisfied the materiality requirement under *Brady* and *Kyles*. The undisclosed evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). As *Kyles* emphasized, materiality does not require proof that the defendant would be acquitted or that the evidence was insufficient absent the *Brady* violation. A reasonable probability of conviction on lesser count satisfies the *Brady* standard.

Respondent's Duty to Disclose the Stoltzfus Materials

Exculpatory and impeachment material that is in the possession and control of the state must be disclosed to the defendant prior to trial. *See generally, Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). Respondent fails to offer a single piece of evidence to rebut Strickler's contention that his trial counsel was never provided with Exhibits 1, 3, 4, 5, and 6. Instead, Respondent argues that under *Brady*, the Commonwealth is required to disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation. *See Barnes v. Thompson*, 58 F.3d 971, 975-77 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 4351 (1995). Respondent claims that there is no *Brady* violation if the information lies in a source where a reasonable defendant would have looked, *Barnes*, 58 F.3d at 975, and argues that the extent of Strickler's investigation at trial is an unresolved factual

issue. Respondent further states that the Stoltzfus materials were available to Strickler because he had notice shortly before the June 1990 trial that Stoltzfus would be a witness.

The Court disagrees. Even though the identity of the witness was known to the defendant before trial, the Stoltzfus materials were not available to the defense because they were not in a *public file* until subpoenaed during federal habeas proceedings. *See Kyles v. Whitley,* 514 U.S. 419 (1995) (holding that prosecutor violated *Brady* and noting that investigatory interviews are not available to defendant, even when names of witnesses and their testimony are known to defense); *United States v. Kelly,* 35 F.3d 929 (4th Cir. 1994) (reversing conviction and ordering new trial where impeachment material was not in public file and rejecting argument that evidence was available to defense with reasonable diligence).

Respondent's Failure To Disclose the Stoltzfus Materials

Augusta Commonwealth's Attorney Ervin prosecuted Strickler. Ervin had an open file policy such that Strickler's trial counsel, William E. Bobbitt, Jr., had full access to the prosecution's files. Both Bobbitt and co-defendant Henderson's defense counsel, Humes Franklin, have submitted affidavits stating that none of the Stoltzfus materials were in the prosecutor's open files which both defense attorneys reviewed in preparing their respective cases, and that they were not aware of the existence of these materials until 1997. *See* Bobbitt Affidavit (8/19/97), Attachment 2 to Petitioner's Motion For

Summary Judgment; Franklin Affidavit (9/5/97), Attachment 3 to Petitioner's Reply To The Warden's Response In Opposition To Strickler's Motion For Summary Judgment.

Of the eight Exhibits that comprise the Stoltzfus materials, Commonwealth Attorney Ervin only recalls reviewing Exhibits 2, 7, and 8 before Strickler's trial. He states that those three documents were in his open prosecution file and thus were accessible to defense counsel. However, Ervin does not remember reviewing Exhibits 1 or 3-6 prior to or during Strickler's trial. *See* Ervin Affidavit, Attachment 6 to Petitioner's Supplemental Memorandum In Further Support Of His Motion For Summary Judgment. Detective Claytor states via affidavit that he recalls distributing his typed report, Exhibit 2, to the Rockingham prosecutor but does not recall distributing any of the other materials prior to or during Strickler's trial. He only recalls producing those documents in response to the subpoena requested by Strickler's current federal habeas counsel. It appears that Strickler's trial counsel, his co-defendant Henderson's trial counsel, and the prosecutor all saw Exhibits 1 and 3-6 for the first time when Det. Claytor produced them from his private files to comply with the federal subpoena.

Respondent produced no evidence that Strickler was provided with Exhibits 1 or 3-6 of the Stoltzfus materials until four working days before the scheduled evidentiary hearing and several weeks after briefing on the cross-motions for summary judgment had been completed, at which time Respondent submitted a one paragraph affidavit by Bobbitt's co-counsel, Thomas E. Roberts, and a newspaper article. Roberts states by affidavit that he

cannot recall seeing any of the Stoltzfus materials, but remembers the information contained in them. He further states that he remembers "discussing with Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time." Roberts Affidavit.

The Court is somewhat skeptical about the accuracy of Roberts affidavit statements. The prosecutor, lead defense counsel for Strickler, and lead defense counsel for co-defendant Henderson all stated by affidavit that they did not see Exhibits 1 or 3-6 of the Stoltzfus materials before or during their respective trials. Roberts has failed to account for how he, unlike all the other participants in these trials, became aware of the plethora of information and impeachment material contained in the Stoltzfus documents. If Roberts was aware of the information contained in the Stoltzfus documents, one wonders why he and Bobbitt would have chosen not to use such powerful impeachment material on cross-examination to cast doubt on the credibility of Stoltzfus, a crucial witness for the Commonwealth.

Despite the Court's skepticism regarding the accuracy of Roberts' affidavit statements, the Court nonetheless accepts Roberts' recollections as accurate and true for the purposes of summary judgment. Even accepting Roberts' statements as accurate and truthful, they are much too vague and insufficient to create a genuine dispute that Exhibits 1, 3, 4, 5, and 6 of the Stoltzfus materials were disclosed to defense counsel in light of all of the evidence to the contrary provided by Strickler and cited herein. The only specific details Mr. Roberts recalls

as impeaching Stoltzfus' testimony is that her story evolved over time and that she had not come forward immediately. Those details are but a portion of the contradictions and discrepancies found within the Stoltzfus materials which have been recounted only in part herein.

The Respondent also submitted a newspaper article from the "Roanoke Times & World-News" dated Sunday, June 17, 1990, the day before Strickler's trial began, and contends that this article contains all of the facts that Strickler claims were wrongfully withheld from him in violation of *Brady*. The Court disagrees with Respondent. This article does include some information that was also included in the Stoltzfus materials. For example, the article states that the individual interviewed, who appears to be Stoltzfus, at some point looked at pictures of Whitlock with John Dean, Whitlock's boyfriend, although it is not clear from the article whether this occurred before or after Stoltzfus identified Strickler. The article has a few details that might have been helpful to Strickler if he did not already know them. Besides these few details, however, the article contains virtually none of the information contained in the Stoltzfus materials and certainly did not relieve the Commonwealth from the burden of providing the Stoltzfus materials to Strickler. Respondent has not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation. A newspaper article which may not have been seen by defense counsel simply does not equate to a prosecutor's obligation under the law.

Thus, the evidence produced by Respondent, viewed in the light most favorable to Respondent, is insufficient

to create a genuine factual dispute as to whether the Commonwealth ever provided Exhibits 1, 3, 4, 5, or 6 – the majority of the Stoltzfus materials – to Strickler. The uncontradicted fact is that it had not. The Commonwealth had an affirmative duty to disclose those materials to Strickler's trial counsel because they contain exculpatory and impeachment material and are also "material" under *Brady* and its progeny.

CONCLUSION

Based on the materials disclosed pursuant to Court ordered discovery, the facts demonstrate that Exhibits 1 and 3-6 contained *Brady* material that was in the possession of the Harrisonburg police department, that the *Brady* material was not contained in the Augusta Commonwealth's Attorney's files, that Strickler's trial counsel reviewed the prosecutor's files pursuant to the "open file" policy, and that the relevant materials were not contained in the file. The pretrial motions and the trial transcript demonstrate the Commonwealth's Attorney's knowledge that several separate police departments and jurisdictions had been involved in the investigation of Strickler's case. The Commonwealth's Attorney called several of these officers as witnesses. He was clearly on notice that the files of these other agencies might contain material required to be disclosed to the defense attorney. Whether from good faith or bad, the effect is that these undisclosed materials were suppressed by the prosecution and never disclosed to Strickler's trial attorney. For the foregoing reasons, the Court will DENY Respondent's

motion, GRANT Petitioner's Motion for Summary Judgment on Claims J and U, thereby vacating Petitioner's conviction. An appropriate Order will enter.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

OCT 15 1997
DATE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TOMMY DAVID STRICKLER,

Petitioner-Appellee,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,

Respondent-Appellant.

No. 97-29

TOMMY DAVID STRICKLER,

Petitioner-Appellant,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,

Respondent-Appellee.

No. 97-30

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-95-924-3)

Argued: March 6, 1998

Decided: June 17, 1998

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by unpublished per curiam opinion. Judge Luttig wrote a separate statement.

COUNSEL

ARGUED: Pamela Anne Rumpz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Barbara Lynn Hartung, Richmond, Virginia, for Appellee. **ON BRIEF:** Richard Cullen, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Mark E. Olive, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The petitioner, Tommy David Strickler, applied for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia following his conviction and death sentence for capital murder in the Circuit Court of Augusta County, Virginia. *See* 28 U.S.C. § 2254.[1]

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[1] Because Strickler's petition for writ of habeas corpus was filed prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, the Chapter 153 amendments of the AEDPA do not apply in this case. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997) (holding that the Chapter 153 amendments, amendments applying to all federal habeas petitions, do not apply to federal habeas petitions pending on the date of the AEDPA's enactment). As to the Chapter 154 amendments, amendments applying to capital petitioners, we need not decide

The district court granted the writ, reasoning that Strickler's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecutor failed to disclose certain evidence at trial. The Commonwealth of Virginia (the Commonwealth), acting through one of its wardens, appeals this ruling. In his cross-appeal, Strickler appeals the district court's dismissal of his claim that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally deficient. Although the district court correctly dismissed Strickler's proportionality review claim, the district court erred when it granted Strickler relief under *Brady*. Accordingly, we affirm in part, vacate in part, and remand with instructions to dismiss the petition.

I

In 1990, Strickler was convicted of, *inter alia*, the capital murder of Leanne Whitlock. As recounted by the Virginia Supreme Court on direct appeal, the facts surrounding Whitlock's murder are:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the Mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne

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whether these amendments apply in this case because Strickler's claims are either procedurally defaulted or meritless under the more lenient pre-existing standards. Indeed, we are confident the AEDPA is of no help to Strickler.

dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.

Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.

As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury that Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote

down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[2] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three

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[2] Leanne was black.

drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his blood-stained blue jeans and his shirt.

Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car near Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in

a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs.

Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground.

Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin, and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots.

Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's,

were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human blood stains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human blood stains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

Strickler v. Commonwealth, 404 S.E.2d 227, 230-32 (Va. 1991).

On February 27, 1990, Strickler was charged with grand larceny, robbery, and abduction in Rockingham County.[3] That same day, Strickler was indicted by an Augusta County grand jury for the robbery and abduction of Whitlock.[4] On April 23, 1990, Strickler was indicted by an Augusta County grand jury for the capital murder of Whitlock. Following a jury trial in Augusta County Circuit Court, Strickler was convicted of all three charges. The jury fixed Strickler's punishment at life imprisonment for the robbery and abduction convictions. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder conviction. Based upon findings of Strickler's future dangerousness and the vileness of the crime, the jury fixed Strickler's sentence at death. The trial court sentenced Strickler in accordance with the jury's verdicts.

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[3] Whitlock was abducted in Rockingham County, but murdered in Augusta County.

[4] As a result of the charges brought in Augusta County, the Rockingham charges were *nolle prosequi*.

Strickler appealed his convictions and sentences to the Virginia Supreme Court, and that court affirmed. *See Strickler v. Commonwealth*, 404 S.E.2d 227 (Va. 1991). On November 4, 1991, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Virginia*, 502 U.S. 944 (1991).

Strickler then sought state collateral relief in the Circuit Court for Augusta County. In September 1993, the circuit court dismissed Strickler's state habeas petition. The Virginia Supreme Court granted a limited appeal to address whether: (1) the state habeas court erred in refusing to vacate Strickler's capital murder conviction because of an erroneous capital murder jury instruction; and (2) his trial counsels' failure to object to the capital murder jury instruction rendered his trial counsels' performance constitutionally ineffective. The Virginia Supreme Court found the former claim procedurally defaulted under state law. *See Strickler v. Murray*, 452 S.E.2d 648, 651 (Va. 1995). As to the latter claim, the court found that Strickler was not prejudiced by the erroneous capital murder instruction and, therefore, failed to meet his burden of showing that, but for trial counsels' error, the result of the proceeding would have been different. *See id.* at 652-53. On October 2, 1995, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Angelone*, 516 U.S. 850 (1995).

On March 5, 1996, Strickler filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia. On May 20, 1996, Strickler filed an amended petition. On January 16, 1997, the district court dismissed, among other claims, Strickler's

claim concerning the Virginia Supreme Court's proportionality review of his death sentence.

Following discovery, Strickler moved for summary judgment on his *Brady* claim. In response, the Commonwealth filed a cross motion for summary judgment. On October 15, 1997, the district court granted Strickler's motion for summary judgment and denied the Commonwealth's cross-motion for summary judgment. The district court held that Strickler's constitutional rights were violated by the prosecutor's failure to disclose certain evidence at trial. The Commonwealth moved for a stay of the district court's judgment pending appeal, which the district court granted. Both Strickler and the Commonwealth noted timely appeals.

II

In the district court, Strickler contended that statements and letters written by Anne Stolzfus, a Commonwealth witness, as well as police reports contained in the Harrisonburg Police Department files,[5] contained exculpatory evidence which was required to be disclosed under *Brady*. The parties refer to this evidence as "the Stolzfus materials," and these materials appear as Exhibits one through eight to an affidavit submitted in the district court by William Bobbitt, Jr., one of Strickler's trial counsel. The district court concluded that Strickler's rights were violated under *Brady* and issued the writ on that basis.

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[5] Harrisonburg is located in Rockingham County.

For two reasons, the Commonwealth contends the district court erred in issuing the writ. First, the Commonwealth contends that the *Brady* claim is procedurally defaulted and that Strickler has not established cause and prejudice to excuse the procedural default. Second, the Commonwealth contends that Strickler's *Brady* claim fails on the merits.

Strickler's *Brady* claim was never presented to the Virginia state courts. Strickler's failure to raise the claim in state court brings into play the doctrines of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and

that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1. We may excuse a procedural default if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Id.* at 750.[6]

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Thus, resolution of the question of whether Strickler's *Brady* claim is procedurally defaulted turns on whether the factual basis of

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[6] Before this court, Strickler has not attempted to establish that our refusal to address his *Brady* claim would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

Strickler's *Brady* claim was available to him at the time he filed his state habeas petition.

We begin our discussion with a summary of the facts surrounding Strickler's *Brady* claim. Prior to trial, Detective Dan Claytor of the Harrisonburg Police Department interviewed Stolzfus on approximately five occasions. Detective Claytor took notes during, and typed reports of, his interviews with Stolzfus and received letters and "summaries" from Stolzfus. These documents, referred to by the parties as the "Stolzfus materials," were kept in Harrisonburg Police Department files.

On the day before trial, an article appeared in the Roanoke Times containing an interview with an unidentified prosecution witness, obviously Stolzfus. In the interview, Stolzfus summarized the circumstances surrounding Whitlock's abduction. This summary tracked her eventual trial testimony and also revealed a fact not contained in her trial testimony: that she had contacted Whitlock's boyfriend and viewed photographs of Whitlock.

At trial, Stolzfus testified that she was interviewed by Detective Claytor on several occasions and described Whitlock's abduction to a reporter from the Roanoke Times approximately one week prior to the trial. Stolzfus also testified that she had identified Strickler in a photo line-up.

As to the circumstances surrounding Whitlock's abduction, Stolzfus testified that on January 5, 1990, she went to the Valley Mall in Harrisonburg with her daughter. Around 6:00 p.m., they entered the Music Land store where she saw two men and a blond woman. One of the

men was "revved up" and impatient. She described the physical features of the three and their clothing. After Stolzfus left the store, she again encountered the trio inside the Valley Mall and spoke briefly to the woman. Shortly thereafter, Stolzfus and her daughter got into their car and stopped in the Valley Mall parking lot when a car came by. The driver was a black woman. Stolzfus described her as a "rich college kid," "beautiful," "well dressed," "happy," "singing," and "bright eyed." Stolzfus testified she got a good look at her and identified the driver as Whitlock.

Whitlock pulled in front of Stolzfus and stopped for traffic. The "revved up" man from the music store, whom Stolzfus later identified as Strickler, came out of the Valley Mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. The second man and the blond woman, seen earlier in the Valley Mall, tried to enter the car also. Whitlock accelerated and "laid on the horn." Strickler hit Whitlock repeatedly on her shoulder and head. When the car stopped, Strickler opened the passenger door, and the other two got into the backseat. The second man, later identified as Henderson, handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time."

Stolzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from" Stolzfus. Stolzfus returned to her car, faced Whitlock, and then asked her three times "are you O.K." Each time Whitlock looked at Stolzfus and then down to her right. Whitlock mouthed a word that

Stolzfus did not understand. She then realized that Whitlock had said "help." Stolzfus pulled away and told her daughter to go inside the Valley Mall and get security. The daughter refused. Whitlock drove past Stolzfus very slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." Stolzfus told her daughter to write the license number down on an index card. Stolzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243."[7]

On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a *Brady* motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all *Brady* material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stolzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

On federal habeas, Strickler served interrogatories and subpoenaed documents from various police and prosecution files. Pursuant to a subpoena, Strickler

[7] For reasons not entirely clear from the record, Stolzfus did not report the incident to law enforcement. However, the record does reflect that Stolzfus was approached by Detective Claytor after she had told a fellow classmate at James Madison University about the January 5, 1990 incident and her classmate informed law enforcement.

obtained the Stolzfus materials from the Harrisonburg Police Department files. Pursuant to another subpoena, Strickler obtained all materials concerning Stolzfus in the current custody of the Augusta County Commonwealth's attorney's office. The prosecutor's file contained Exhibits two, seven, and eight, but did not contain Exhibits one and three through six.[8]

[8] There is a dispute between the parties concerning which exhibits were disclosed to Strickler prior to trial. In response to Strickler's interrogatories, Lee Ervin, the prosecutor in Strickler's case, stated that he reviewed only Exhibits two, seven, and eight and had never reviewed Exhibits one and three through six prior to Strickler's trial. Ervin also stated that Exhibits two, seven, and eight were in his prosecution file and were disclosed to defense counsel pursuant to the open file policy. Bobbitt stated in his affidavit that he had never seen any of the Stolzfus materials prior to, or during, Strickler's trial, notwithstanding the open file policy. Similarly, Humes J. Franklin, Jr., Henderson's trial counsel, stated in his affidavit that he had no recollection of seeing any of the Stolzfus materials in Ervin's files. However, Thomas Roberts, Strickler's other trial counsel, stated in his affidavit that, although he could not recall if he had seen the Stolzfus materials, he did recall the "information contained in them." Roberts also stated that he had discussed with Bobbitt the "possibility that Ms. Stolzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time." According to Roberts, "[i]t seemed too good to be true." The district court never resolved this dispute because the district court concluded that even if Exhibits two, seven, and eight were disclosed to Strickler, his rights under *Brady* were violated. We need not decide this factual dispute because, as discussed *infra*, Strickler's *Brady* claim is procedurally defaulted; Strickler has not established cause and prejudice to excuse the default; and the claim is, in any event, without merit.

As noted above, the Stolzfus materials appear as Exhibits one through eight to an affidavit submitted in the district court by Bobbitt. Exhibit one is a one-page document containing Detective Claytor's hand-written notes of his initial January 19, 1990 interview with Stolzfus. The notes reveal that Stolzfus could not identify Whitlock; could identify the blond woman; and indicated that Henderson was tall, had black hair, and wore a cream colored jacket. Exhibit two is a six-page, typed report of Detective's Claytor's interviews with Stolzfus on January 19 and 22, 1990. The report contains a detailed summary of Stolzfus' account of Whitlock's abduction. However, Detective Claytor's report notes that Stolzfus was not sure if she could identify Strickler and Henderson, although Stolzfus indicated she might if she saw Strickler and Henderson in person. Exhibit two also notes that Stolzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. According to the report, the next day Stolzfus advised police that she now recalled the license number, NKA 243, and "had made up a code to help remember the license number after the incident, 'No Kids After 243.' "

Exhibit three entitled "Observations" was given to Detective Claytor by Stolzfus on January 19, 1990, at 1:00 p.m. In this exhibit, Stolzfus describes the abduction with a set of diagrams.

Exhibit four is a typed letter, dated January 22, 1990, to Detective Claytor signed by Stolzfus. In this letter, Stolzfus explains that although she did not initially remember being at the Valley Mall on the evening Whitlock was abducted, her memory was "jogged" when her daughter reminded her of a small purchase at a shop in

the Valley Mall. In this exhibit, Stolzfus also explains that she was uncertain about portions of the events she witnessed the evening of Whitlock's abduction:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person? . . .

Exhibit five is an undated, typed document entitled "Notes for Detective Claytor: My Impressions of the Car." In this exhibit, Stolzfus gives a description of the car driven by Whitlock, but does not mention the license plate or the license plate number.

Exhibit six is a hand-written note to Detective Claytor from Stolzfus dated January 25, 1990, 1:45 a.m. In this note, Stolzfus reports that she spent several hours with Whitlock's boyfriend viewing photographs and was certain Whitlock was the black girl she saw on January 5, 1990.

Exhibit seven is a typed two-page letter dated January 26, 1990, to Detective Claytor and signed by Stolzfus. This letter contains a description of Stolzfus' encounter with Strickler, Henderson, and the blond woman at the music store in the Valley Mall.

Exhibit eight is a three-page, typed document, undated and signed by Stolzfus. The document is entitled "Details of Encounter with Mountain Man, Shy Guy and Blond Girl." This exhibit contains a detailed description

of Stolzfus' encounter with Strickler, Henderson, and the blond woman in the Valley Mall and of Whitlock's abduction. The summary of Whitlock's abduction in this exhibit essentially mirrors her trial testimony and the facts set forth in the Roanoke Times article.[9]

We are of the opinion that the factual basis of Strickler's *Brady* claim was available to him at the time he filed his state habeas petition and, therefore, the *Brady* claim is procedurally defaulted under the authority of *Hoke* and Va. Code Ann. § 8.01-654(B)(2). Strickler, of course, knew that Stolzfus was interviewed by Detective Claytor on several occasions and had identified Strickler in a photo line-up. In light of these facts, reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files concerning Stolzfus' statements to Detective Claytor. Upon such a simple request, it is likely the state court would have ordered the production of the files. In other words, in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files, *see* Va. S. Ct. Rule 4:1(b)(5) (extending discovery, with prior leave of court, to all matters that are relevant and not privileged). His failure to do so results in a procedural default of his *Brady* claim.

Having concluded that Strickler's *Brady* claim would be procedurally defaulted if he attempted to raise it in

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[9] The Roanoke Times article was produced by the Commonwealth as an exhibit in its cross-motion for summary judgment.

state court at this time, we can only address Strickler's *Brady* claim if he can demonstrate cause and actual prejudice. *See Coleman*, 501 U.S. at 750. Objective factors that constitute cause include " 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.' " *McClesky v. Zant*, 499 U.S. 467, 493-94 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988). Additionally, the novelty of a claim has been held to constitute cause. *See Reed v. Ross*, 468 U.S. 1, 12-16 (1984); *see also Dugger v. Adams*, 489 U.S. 401, 407 (1989) (stating that cause may be established upon demonstration that a constitutional claim is "so novel that its legal basis is not reasonably available to counsel"). Finally, a petitioner may establish cause by showing he received constitutionally ineffective assistance of counsel. *See Coleman*, 501 U.S. at 753; *Murray*, 477 U.S. at 488.[10]

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[10] Generally, "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 489; *see also Pruett v. Thompson*, 996 F.2d 1560, 1570 (4th Cir. 1993). This is so because allowing a petitioner to raise a claim of ineffective assistance of counsel for the first time on federal habeas review in order to show cause for a procedural default would place the federal habeas court "in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available" in contravention of "[t]he principle of comity that underlies the exhaustion doctrine." *Murray*, 477 U.S. at 489. Strickler has satisfied this requirement by presenting an ineffective assistance of counsel claim based on trial counsels' failure to file a *Brady* motion to the state court on state habeas.

Strickler asserts that the factual basis for his *Brady* claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause for the procedural default. But, as noted above, Strickler's *Brady* claim was available to him in state court through the exercise of reasonable diligence. As such, he cannot establish cause based upon the unavailability of the *Brady* claim. *See Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994) ("Even if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.").

Strickler also argues that his trial counsel were constitutionally ineffective for failing to make a *Brady* motion at trial. If attorney error amounts to constitutionally ineffective assistance of counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Amendment dictates that the attorney's error must be imputed to the state. *See Coleman*, 501 U.S. at 754. Accordingly, Strickler may establish cause to excuse his procedural default by showing trial counsel error that satisfies the standard set forth in *Strickland*. *See id.* at 752. Under *Strickland*, a defendant is deprived of the assistance of counsel guaranteed by the Constitution when counsel's performance falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

In this case, Strickler's trial counsels' action did not fall below an objective standard of reasonableness. In

light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion. *Cf. Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir. 1983) ("Counsel had no duty to file pre-trial motions, because the prosecutor established an open file policy that made filing of discovery motions or *Brady* requests pointless.").

Even if we were to agree with Strickler that cause exists to excuse his procedural default, Strickler cannot establish prejudice. To establish "actual prejudice," Strickler "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir.), *cert. denied*, 118 S. Ct. 595 (1997).

Under *Brady* and its progeny, the prosecution's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Ellis*, 121 F.3d 908, 914 (4th Cir.) (quoting *Brady*, 373 U.S. at 87), *cert. denied*, 118 S. Ct. 738 (1998); *accord Kyles v. Whitley*, 514 U.S. 419, 431 (1995). However, evidence is material "only where there exists a 'reasonable probability' that had the evidence been disclosed the result of the trial would have been different." *Ellis*, 121 F.3d at 914 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995)). A "reasonable probability" of a different result is shown when the government's failure to disclose evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

In our view, the Stolzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial. During either phase, Strickler never contested that he abducted and robbed Whitlock. In fact, counsel for Strickler argued to the jury during the guilt phase that they should convict Strickler of first degree murder rather than capital murder because Henderson, rather than Strickler, actually killed Whitlock. Thus, Stolzfus' testimony was not critical to the Commonwealth's case, especially in view of the overwhelming evidence in the record, independent of Stolzfus' testimony, demonstrating that Strickler abducted and robbed Whitlock. During the sentencing phase, Stolzfus' testimony was of no import. For the future dangerousness aggravating circumstance, the parties focused their arguments on Strickler's prior criminal record, which included approximately eleven prior convictions. As to the vileness predicate, although the prosecutor did state the uncontested fact that Whitlock was abducted, the focal point of his argument was on the use of the sixty-nine pound boulder to crush and fracture Whitlock's skull. In short, the failure to disclose any or all of the Stolzfus materials does not undermine our "confidence in the outcome of the trial." *Id.*

In summary, Strickler's *Brady* claim is procedurally defaulted and he has failed to establish cause and prejudice to excuse the default. Accordingly, the district court erred when it granted the writ on Strickler's *Brady* claim.[11]

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[11] Even if we could get beyond the threshold question of procedural default, for the same reasons why Strickler cannot demonstrate prejudice to excuse the procedural default of his *Brady* claim, Strickler's *Brady* claim fails on the merits.

III

In his cross-appeal, Strickler contends that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally inadequate. In response, the Commonwealth contends that this claim is procedurally defaulted and that Strickler has not established cause to excuse the procedural default. Alternatively, the Commonwealth argues that the claim is without merit.

Strickler presented this claim for the first time in his state habeas petition and it was found to be procedurally defaulted under the authority of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). In *Slayton*, the Virginia Supreme Court held that claims that could have been raised at trial or on direct appeal but were not cannot be considered on collateral review. *Id.* at 682. The district court held that Strickler's proportionality review claim was procedurally defaulted under *Slayton* and that Strickler failed to establish cause and actual prejudice to excuse the default.

Absent cause and actual prejudice or a miscarriage of justice,[12] a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. *See Harris v. Reed*, 489 U.S. 255, 262

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[12] Because Strickler has not attempted to establish that our refusal to address his procedurally defaulted proportionality review claim would result in a miscarriage of justice, we do not address the miscarriage of justice exception.

(1989). Such a rule is adequate if it is regularly or consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Under federal habeas law, we are not at liberty to question a state court's application of a state procedural rule because a state court's finding of procedural default is not reviewable if the finding is based upon an adequate and independent state ground. *See Harris*, 489 U.S. at 262; *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). Because *Slayton* is an independent and adequate state ground, we can consider only whether cause and prejudice exists to excuse the procedural default, not whether the state court correctly applied its own law. *See Harris*, 489 U.S. at 262.

Strickler contends that he has established cause because he was unable to raise his proportionality review claim until after the Virginia Supreme Court conducted such a review and subsequently affirmed his sentence on direct review. We disagree.

As noted earlier, objective factors that constitute cause include " 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.' " *McClesky*, 499 U.S. at 493-94 (quoting *Murray*, 477 U.S. at 488). Findings of the state court supporting its decision to apply the state procedural default rule are entitled to a presumption of correctness in determining whether cause exists to excuse a procedural default. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Stockton*, 41 F.3d at 924.

An issue before the Virginia Supreme Court on direct appeal was whether Strickler's death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *See* Va. Code Ann. § 17-110.1(C)(2). Obviously, Strickler was free to assert, and the Virginia Supreme Court was free to entertain, a facial challenge to all proportionality review in the Commonwealth of Virginia on direct appeal, prior to the Virginia Supreme Court's proportionality review. Furthermore, Strickler was free to assert, and the Virginia Supreme Court was free to entertain, an as-applied challenge to the proportionality review that he received on direct appeal in a rehearing petition to the Virginia Supreme Court. In fact, Strickler filed a petition for rehearing, but did not challenge the Virginia Supreme Court's proportionality review of his death sentence. Accordingly, Strickler has not met his burden of " 'showing that the factual or legal basis for [the proportionality review] claim was not reasonably available to counsel,' " *McClesky*, 499 U.S. at 494 (quoting *Murray*, 477 U.S. at 488), and, therefore, has failed to establish cause to excuse the procedural default.[13]

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[13] Even if we were able to get past the threshold question of procedural default, Strickler would not be entitled to relief. First, it is well-settled that no proportionality review is constitutionally mandated. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). As we stated in *Petersen v. Murray*, 904 F.2d 882 (4th Cir. 1990), "this court may not issue a writ of habeas corpus on the ground that the [Virginia] Supreme Court has made an error of state law." *Id.* at 887 (citation and internal quotes omitted). *See*

IV

For the reasons stated herein, the judgment of the district court is affirmed in part, vacated in part, and remanded with instructions to dismiss the petition.

AFFIRMED IN PART, VACATED IN PART AND REMANDED WITH INSTRUCTIONS

LUTTIG, Circuit Judge:

Appellee/cross-appellant Tommy Strickler has filed a motion that I be disqualified from participation in the decision of this case pursuant to 28 U.S.C. § 455. (On different grounds, counsel for Strickler earlier sought, and was denied, recusal of the state habeas judge.). As grounds for disqualification, Strickler's counsel, Barbara L. Hartung and Mark E. Olive, cite the "unavoidable parallels" between the murder of my dad and the murder of Leanne Whitlock for which Strickler stands convicted. The Commonwealth opposes the motion for the reasons stated in its response.

The circumstances surrounding my dad's murder are so different from those surrounding the murder of Leanne Whitlock that, in my judgment, no one, except those who believe I should not sit in any murder case

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also Buchanan v. Angelone, 103 F.3d 344, 351 (4th Cir. 1996) (stating that claim that proportionality review was inadequate cannot form the basis of federal habeas corpus relief), *aff'd*, 118 S. Ct. 757 (1998). Second, we have examined the proportionality review conducted by the Virginia Supreme Court, *see Strickler v. Commonwealth*, 404 S.E.2d at 237, and we cannot conclude that Strickler has been denied any federal constitutional right, if one were to exist, to adequate and meaningful proportionality review.

because my dad was the victim of a murder, could, on this ground, reasonably question my ability to sit impartially on the panel deciding this case. Moreover, the legal issues presented in this appeal have no counterpart whatever in any of the proceedings involving those who murdered my dad. Accordingly, the motion is denied.

My dad was murdered in the driveway of his home in Tyler, Texas, during a carjacking, at approximately 11:00 p.m. on April 19, 1994 – more than four years ago now. Upon exiting his vehicle in the garage, my dad was confronted by three armed, black youths, and shot twice in the head with a .45 caliber weapon. A single shot was fired at my mother, but she was not struck. The three perpetrators left my parents' home immediately. No personal items, other than the car, were stolen from my dad or my mother. Nothing was stolen from the interior compartments of my parents' car. At trial, it was shown that the three youths who murdered my dad had contemplated, and actually attempted, other carjackings in the immediately preceding days and that they had, on the night of the murder, followed my mother and dad to their home, having the purpose and intent of stealing my parents' vehicle. Although the three who murdered my dad were black, there was no testimony presented of either racial motivation or racial animus. Two of the three youths were convicted in federal court on carjacking charges and in state court on murder charges. The third was convicted of capital murder in state court.

There are few parallels between the circumstances of my dad's murder and the circumstances of Leanne Whitlock's murder, and those that do exist are the most general in nature – for example, that three perpetrators were

involved and that they stole a vehicle. Leanne Whitlock was a black female, and a sophomore at James Madison University when she was murdered. Whitlock was forcibly abducted from a shopping mall parking lot in the early evening hours by Strickler, a white adult male, and two white adult companions.

The three forced Whitlock to drive to a distant cornfield, where she was apparently raped, and then killed with a 69-pound boulder. *Id.* at 231. According to the Virginia Supreme Court, whose findings in this particular regard are not before us for review:

> Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking.

Id. The Virginia Supreme Court affirmed that Whitlock's "[d]eath was caused by four large, crushing, depressed skull fractures with lacerations to the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were embedded in the brain." *Id.* Whitlock's nude, frozen, buried body was subsequently found in the field by authorities. Again according to the Virginia Supreme Court, the shirt worn by Strickler the night of the murder "bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified." *Id.* at 231-32. Said the court:

> Prior to [Whitlock's] murder, the victim had been abducted by strangers, was terrified and called for help, was driven to a deserted field, was dragged, struggling, out of her car, was stripped naked, beaten, kicked, and sexually assaulted.

Id. at 237.

After the murder, Strickler and his codefendant discussed, in the presence of a third person, a fight they had had with a "nigger," *id.* at 231; Strickler said they had kicked the "nigger" in the back of the head, had used a "rock crusher," and that the "nigger" would give them no more trouble. *Id.* Strickler, his codefendant, and the third person then drove back to the town where the murder occurred "to purchase drugs." *Id.*

Strickler was indicted for robbery of not only Whitlock's vehicle, but also other of her personal property, including her wristwatch, earrings, and bank card. *Id.* at 230-31. Although Strickler was indicted and apparently convicted for robbery of Whitlock's vehicle, it is unclear whether Whitlock's vehicle was stolen principally for the value of the car itself or instead as a get-away vehicle; the suggestion is that the latter was the purpose. *See Strickler v. Commonwealth*, 404 S.E.2d 227, 230 (Va. 1991) ("Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounded on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window.").

Apart from the dissimilarity of the circumstances between my dad's murder and Whitlock's murder, to my

knowledge the issues presented by this appeal under *Brady v. Maryland*, 373 U.S. 83 (1963), bear no resemblance in any respect to any of the issues raised by any of those convicted of my dad's murder in any of their proceedings to date. Indeed, insofar as I am aware, there has never been raised an issue of changing eye-witness testimony or the improper withholding of exculpatory evidence in any of the appeals from the convictions for my dad's murder.

Against the backdrop of the factual and legal dissimilarities between my dad's murder and the appeals from the ensuing convictions on the one hand, and Leanne Whitlock's murder and the instant appeal on the other, the natural inference arises that the present disqualification motion has been filed not because my dad was the victim of a murder, but, rather, because I am the author of three, and I joined a fourth, of this Circuit's authorities which Strickler's counsel could have reasonably surmised might bear upon the disposition of the appeals *sub judice*. *See Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995) (Luttig, J.), *cert. denied*, 116 S. Ct. 4351 (1995); *Hoke v. Netherland*, 92 F.3d 1350 (4th Cir.) (Luttig, J.), *cert. denied*, 117 S. Ct. 630 (1996); *In re Netherland*, No. 97-8 (4th Cir. Apr. 10, 1997) (Luttig, J., single Circuit Judge) (staying district court's *ex parte* grant of pre-petition discovery to state prisoner); *In re Pruett*, 133 F.3d 275 (4th Cir. 1997) (Hall, J., joined by Luttig and Motz, JJ.).

Because of the time that has elapsed since my dad's murder; the dissimilarity of the circumstances surrounding my dad's and Leanne Whitlock's murders; and the lack of any overlap in the legal issues presented in the appeals of the two cases, I do not believe that it can

reasonably be maintained either that I cannot impartially sit in judgment of this appeal or that my impartiality can fairly be questioned. Nor, any more than recusal from discrimination cases should be required by judges who themselves, or whose families, have been subjected to invidious racial or sexual discrimination, do I believe that my recusal is required from this and all other murder cases for the reason alone that my dad was the victim of a murder.

The purpose of section 455 is not to require recusal from the courts of all who have experienced the fullness of life – good and bad; and certainly its purpose is not to enable forum shopping by parties to litigation. Rather, its purpose is only to ensure that the matters before the courts are decided by a judiciary that is impartial both in fact and in appearance. I do not believe that this indisputably important purpose is, in any way, compromised or disserved by my participation in this case. As I have earlier stated in open court, capital defendants are entitled to fair and impartial consideration of their claims by me when I am randomly selected to serve on the panel hearing their cases. Neither before nor after my dad's murder have they received less.

98-5864 STRICKLER, TOMMY D. V. GREENE, WARDEN

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following questions:

1. Whether the States violaded [sic] *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

2. If so, whether the State's nondisclosure of exculpatory evidence and the State's representation that its open file contained all *Brady* material establishes the requisite "cause" for failing to raise a *Brady* claim in state proceedings.

3. Whether petitioner was prejudiced by non-disclosure.

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(8)

Supreme Court, U.S.
FILED
DEC 9 1998
OFFICE OF THE CLERK

No. 98-5864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOMMY DAVID STRICKLER,
Petitioner,

v.

FRED W. GREENE, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

The Court directed the parties to address the following questions:

1. Whether the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

2. If so, whether the State's nondisclosure of exculpatory evidence and the State's representation that its open file contained all Brady material establish the requisite "cause" for failing to raise a *Brady* claim in state proceedings.

3. Whether petitioner was prejudiced by non-disclosure.

PARTIES TO THE PROCEEDINGS

All parties are named in the caption.

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IN THE
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No. 98-5864

TOMMY DAVID STRICKLER,
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v.
FRED W. GREENE, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of habeas corpus relief (J.A. 403-34) is not reported, but the judgment is noted at 149 F.3d 1170. The opinion of the district court granting habeas corpus relief (J.A. 382-402) likewise is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1998. A timely petition for rehearing was denied on July 14, 1998. The petition was filed on September 1, 1998, and was granted on October 5, 1998. 119 S. Ct. 27 (1998). This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial [] by an impartial jury * * * [and] to be confronted with the witnesses against him * * *." The pertinent provisions of the Virginia Code and of the Rules of the Supreme Court of Virginia are reproduced in the appendix to this brief beginning at page B-1.

STATEMENT OF THE CASE

Leanne Whitlock, a student at James Madison University, was last seen alive on January 5, 1990. Eight days later, her nude body was recovered from a wooded area in the Virginia countryside, where it had been buried under logs and covered with leaves. Near the body, police found a large rock with blood stains suggesting that it had been used to crush the victim's skull. In a nearby cornfield, a farmer and the police found a pile of Ms. Whitlock's frozen clothing, a blue baseball cap, and a wallet belonging to one Ronald Henderson. J.A. 85-88, 408-09. Although the victim was black, Caucasian hairs were found on her clothing and in the cap. *Id.* at 135-37.

Henderson and petitioner (who had later been seen, together with a white female, in open possession of the car the victim was driving at the time she disappeared) were both charged with Ms. Whitlock's abduction, robbery and capital murder. Henderson, who fled and was tried last, was acquitted of capital murder. J.A. 2-7, 329.[1]

[1] Henderson was convicted of first-degree murder and sentenced to life imprisonment. He and petitioner were also convicted of abduction and robbery and received life imprisonment sentences on those counts.

Based primarily on the testimony of Anne Stoltzfus, a purportedly disinterested eyewitness who claimed in vivid, chilling detail that she had witnessed petitioner's forcible abduction of Ms. Whitlock, the Commonwealth convicted petitioner of capital murder and sentenced him to death. The Supreme Court of Virginia affirmed his convictions and sentences, and later affirmed the denial of collateral relief. The United States District Court for the Eastern District of Virginia, however, granted him a writ of habeas corpus after finding that the Commonwealth withheld exculpatory evidence that, by showing that the bulk of Stoltzfus' "memories" likely resulted from coaching by the police and those close to the victim, would have destroyed Stoltzfus' credibility and furnished grounds for barring her testimony as unreliable altogether. The court of appeals reversed. J.A. 403-34.

A. State Court Proceedings

1. *The Trial*

1. The prosecution's theory at trial was that petitioner, armed with a weapon, abducted Leanne Whitlock from the parking lot of the Valley Shopping Mall ("Mall") in Harrisonburg, Virginia, and forced her to drive her car to a field outside of town, where he robbed and killed her. The prosecution's proof and argument were intended to show that petitioner acted in concert with Ronald Henderson and with an unidentified blonde woman, but that petitioner was the one who initiated the abduction, used a weapon to accomplish it, and was the instigator, architect, and prime mover of the harm that befell the victim. To paint that picture of petitioner as chief architect of the crime, the State relied extensively on the testimony of Stoltzfus, a purported eyewitness to Ms. Whitlock's abduction. In her detailed trial testimony, Stoltzfus unhesitatingly identified petitioner as a man whom she had had ample occasion to notice at the Mall before Ms. Whitlock appeared on the scene, vividly recounted how she then saw petitioner burst into Ms. Whitlock's car as she arrived

at the Mall, and furnished the key factual predicates for the prosecutor's argument that once inside Ms. Whitlock's car, petitioner secured the victim's acquiescence to the abduction by brandishing a knife.

2. After swearing that she knew where she was on January 5, 1990, Stoltzfus testified that she and her fourteen year old daughter drove to the Mall to purchase a compact disc for another of Stoltzfus' daughters, for whom they were having a late Christmas. They arrived as Musicland, one of the Mall's stores, at about six o'clock. J.A. 36. While Stoltzfus and her daughter waited for a Musicland employee to assist them, a blonde woman and a man whom Stoltzfus called "Mountain Man" came into the store. *Ibid.* "Mountain Man" was "very impatient" and so "frightened" Stoltzfus that she backed into another Musicland patron, "a tall dark haired fellow" whom Stoltzfus called " 'Shy Guy' because he seemed a bit shy." *Ibid.* "Shy Guy" had a tan-colored coat draped over his arm, and Stoltzfus felt something hard in the coat when she bumped against it. According to Stoltzfus, "Shy Guy" "seemed kind of defensive and quickly put [the coat] on." *Id.* at 37. Stoltzfus apologized to "Shy Guy," and told the Musicland clerk to wait on "Mountain Man" first "because he seemed very impatient and revved up." *Id.* at 36.

Stoltzfus testified that she left the store and returned at 6:45 p.m. At that time, she observed "Shy Guy" walking by himself, followed in the distance by the blonde woman and then by "Mountain Man." "Mountain Man" was calling after the blonde woman, "Donna, Donna, Donna." J.A. 38. Stoltzfus "stopped in [her] tracks because ["Mountain Man"] was so revved up that [she] was concerned." *Id.* at 39. "Mountain Man" and the blonde woman had a brief conversation, during which Stoltzfus claimed they referred to "Shy Guy" as "Ronnie."[2]

[2] According to Stoltzfus' testimony, "Mountain Man" asked the blonde woman where "Ronnie" was. She replied "up there."

As the blonde woman turned to leave, she bumped into Stoltzfus and a button in her attire caught in Stoltzfus' open weave sweater. Still "concerned about their behavior," Stoltzfus "tr[ied] to follow them," but was unsuccessful. *Id.* at 39, 40. She and her daughter then returned to Musicland, only to find that no one knowledgeable about her proposed CD purchase was on hand. They decided to leave the Mall. *Id.* at 40.

As Stoltzfus and her daughter prepared to drive out of the parking lot, Stoltzfus claimed she noticed a shiny dark blue car driving in. The driver, a young black woman, "was beautiful. She was well dressed and she was happy, she was singing * * *." J.A. 41. Stoltzfus recalled pulling into a lane of traffic immediately behind the blue car. Just ahead of the blue car, a minivan stopped to drop off some passengers and brought traffic to a standstill. *Id.* at 42. At that time, "Mountain Man" came "tearing" out of the Mall entrance door and ran up to the driver of the van. He was talking to the driver of the van "and then was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where 'Shy Guy' and 'Blonde Girl' was standing." *Id.* at 42-43. After briefly accosting the passengers in a vehicle that was waiting behind the van, "Mountain Man" moved on to the blue car, which he began pounding and shaking on the passenger side. And "then he just really shook it hard and you could tell he was mad." The door finally gave way, and "Mountain Man" jumped inside the blue car. *Id.* at 43-44.

According to Stoltzfus' account, the driver of the blue car attempted to push "Mountain Man" away. Mountain Man opened the passenger door and motioned for "Shy

"Mountain Man" then expressed a desire to leave the Mall, to which the woman replied that "Mountain Man" and "Ronnie" should meet her at the bus stop. J.A. 39.

Guy" and the blonde woman to join him inside. The blonde woman came to the car and put her left foot up inside. J.A. 44. The driver of the blue car "just laid on the horn" while "Mountain Man" repeatedly hit her. *Ibid.*[3] Stoltzfus "became concerned and upset" and "honked [her own] horn." *Id.* at 45. "Mountain Man" stopped hitting the young driver and opened the door again. "Shy Guy" and the blonde woman got into the back seat of the car. "Shy Guy" handed his coat over the seat to "Mountain Man," who "fiddled with it" for a long time. *Id.* at 45. After he was done "fiddling" with the coat, "Mountain Man" faced the driver "and the other two in the back seat sat back and relaxed." *Ibid.*

Stoltzfus went on to recount in chilling detail how she approached the driver of the blue car—first by pulling up in her own car and then on foot—and repeatedly inquired whether the driver was "O.K." J.A. 45-46. Stoltzfus' approach caused "Shy Guy" to cower in the back seat, but elicited little reaction from the driver of the blue car, who appeared completely frozen. To every one of Stoltzfus' inquiries, the driver responded by making "direct eye contact and then look[ing] down. Just very serious, looked down to her right." *Id.* at 46. At last, the driver "just mouthed a word" which Stoltzfus did not immediately understand, but soon realized was "help." As Stoltzfus argued with her daughter about what should be done, the blue car began to drive away—once again with the horn blaring. *Id.* at 48. Stoltzfus gave her daughter a "3 x 4 index card" and instructed her to write down

[3] As Stoltzfus put it in her trial testimony (J.A. 44):

> The horn must have blown, blew a long time and she couldn't go because the three people who had been in the [car immediately ahead] were now walking from the parking lot in front of the [blue] car into the Mall. O.K., but when she stepped on the gas to go forward, the Blonde Girl jumped back and of course didn't get into the car and so she is just laying on the horn now and Mountain Man started hitting her and hitting her.

the blue car's license number. Stoltzfus claimed to remember that license number—"West Virginia, NKA 243"—because she had told her daughter at the time "to remember, No Kids Alone, 243, and I said 'remember, 243 is my age.'" *Id.* at 48. The blue car drove off. Stoltzfus did not call the authorities.

Asked if she got "a good look" at "Mountain Man" and "Shy Guy" during the incidents she purportedly witnesed on January 5th, Stoltzfus responded "Oh yes, I certainly did." J.A. 38. She elaborated that she remembered how the two were dressed, described their clothing in great detail, and she even remembered that their clothing was not at all soiled in any way. *Id.* at 37-38. Stoltzfus also asserted that she "absolutely" got a good look at the driver of the blue car. She positively identified petitioner in open court as "Mountain Man," and, from photographs, also unequivocally identified the driver of the blue car as Leanne Whitlock. *Id.* at 42, 49-50.

3. The cross-examination of Stoltzfus, a civilian witness with no apparent bias or other evident motive to fabricate such a highly detailed, shocking tale, understandably focused on the reliability of her recollections and, particularly, of her in-court identifications. Stoltzfus, however, skillfully parried all defense attempts to impugn her precise and seamless account. She forcefully invoked her "exceptionally good memory" and her various opportunities to observe the three malefactors, up-close and at length, to buttress her unequivocal in-court identification of petitioner:

> I have an exceptionally good memory. I had very close contact with him and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification.

J.A. 58; *id.* at 59 (same with respect to "Shy Guy").

Indeed, Stoltzfus asserted that she had given "detailed descriptions of the three persons" (J.A. 57) when she first

spoke to law enforcement, claimed that she told the police "exactly" what she testified to at trial (*id.* at 52), and insisted that she had positively identified petitioner and "Shy Guy" in police photo line-ups early in the investigation, strongly suggesting that she had told a consistent, unwavering story from the beginning:

> I was very sure of the two men I was shown. I was shown "Mountain Man" on Friday afternoon and I was one hundred percent sure because of the profile and the distinctive nose. Monday I was confident of the identity of "Shy Guy." The "Blonde Girl," I was a little less sure of.
>
> * * * *
>
> I picked two [photographs] with absolute certainty and the third with a slight reservation.

Id. at 56. With respect to her inability to identify the blonde woman with any certainty, Stoltzfus stated that she "thought" one of the pictures in a photo spread was "Donna," but that she had been "very distress[ed]," while waiting in the witness room, to see that another witness in the case against petitioner "look[ed] like her too." *Id.* at 60.

4. The Comonwealth did not call Stoltzfus' daughter, any employee of Musicland, or any other Mall patron to testify about the bizarre, presumably noticeable public conduct related by Stoltzfus. The Commonwealth did call two additional witnesses who were meant to provide direct evidence against petitioner. The first, Kurt Massie, claimed that he was driving (with a friend) on Route 340 at 7:30 p.m. on January 5th. It was already dark. Massie nonetheless claimed he saw petitioner, whom he had never before met, drive a dirty blue car with *two* additional occupants (one man and one woman) into a field near where the victim's body was later found. J.A. 66-67, 70. He also claimed all occupants of the vehicle were *white*. *Id.* at 72-73.

The second witness, Donna Tudor, agreed to testify for the Commonwealth after she was arrested for grand lar-

ceny based on her possession of Ms. Whitlock's car. (Despite her willingness to testify for the prosecution, the Commonwealth kept her incarcerated as a flight risk). J.A. 97-98, 100. She claimed that Henderson and petitioner arrived at Dice's Inn, a bar in Staunton, at around 9:30 p.m. on January 5th. According to Donna, petitioner was wearing dirty, bloody blue jeans. Donna left the bar with Henderson and petitioner in a blue car.[4] She claimed to have heard petitioner and Henderson, once inside the car, discuss having crushed "it" and use a racial epithet; she also described an altercation between petitioner and Henderson during which petitioner allegedly threatened Henderson with a knife. *Id.* at 90-95. Petitioner and Donna spent the next week together, driving around town and elsewhere in the blue car. Donna claimed at trial that, during that time, she saw petitioner in possession of the victim's bank card, identification documents and other property, including a pair of earrings that were found in Donna's possession when she was later arrested. *Id.* at 96-97. It was then that she first claimed that the earrings were a gift from petitioner.[5]

Donna's account was subject to devastating impeachment. Not only did she testify in an effort to curry favor with the prosecutor and to shift suspicion away from herself, but several of Dice's patrons who were called by the *prosecution* did not agree with Donna's claim that petitioner's clothes were "bloody" or otherwise remarkable

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[4] Donna Tudor identified photographs of a car owned by Leanne Whitlock's boyfriend, John Dean, which Ms. Whitlock had borrowed from him the day she disappeared. J.A. 90, 17-18. Donna described how petitioner cut up the interior and jumped on the roof of the car several days later, after a fight with Donna. *Id.* at 98-99. That particular manifestation of a lover's quarrel suggests that petitioner viewed the car as *Donna's* property.

[5] Donna Tudor also claimed that petitioner's mother had washed bloody clothes petitioner was wearng on January 5th. That claim was squarely disputed by petitioner's mother and sister. J.A. 143, 147.

when he arrived at Dice's Inn.[6] In addition, her husband, Jay Tudor, testified that Donna had earlier admitted to him that *she* had been present during Ms. Whitlock's murder, and that petitioner did *not* participate in the crime. J.A. 151. Instead, Donna had related that the victim knew Henderson and petitioner and she had *voluntarily* "picked [them] up" "a couple of days" before she was killed. *Id.* at 153-54. According to Donna's earlier statement, Donna was in the victim's car on the day of the murder, while "the other boy and girl w[ere] outside the car [in the corn field] and she tried to get away * * *. [T]he other fellow jumped on her and started beating her and couldn't stop." *Id.* at 154. He used his "fist * * * and a rock." *Ibid.*

The remainder of the Commonwealth's case was circumstantial. A forensic expert testified for the prosecution that a *single* Caucasian hair fragment and *two* Caucasian head hairs that were found on the victim's clothing "could" have originated from petitioner, based on similarities in microscopically identifiable characteristics. J.A. 136. His opinion was expressly couched as a possi-

[6] Debra Sievers was at Dice's Inn and examined petitioner closely enough to determine that he was not wearing jeans, but pants that "looked like jeans" because they were made of denim. J.A. 79. She testified that petitioner's pants "were a little dirty," but otherwise there was nothing noticeable about them. *Ibid.* Carolyn Brown also saw petitioner at Dice's, but "didn't pay all that much attention to him * * * he was dressed right nice I thought." *Id.* at 75. Further prompting and leading questions from the prosecutor elicited from Brown only that petitioner's pants were "a little bit dirty * * * like they had been wore a couple days or so." *Ibid.* A third patron, Nancy Simmons, *danced* with petitioner yet gave no testimony that there was anything remarkable about his clothing. She did testify that *Henderson* danced with her and gave her a watch (*id.* at 81-82), which was later identified as belonging to the victim. (The Virginia Supreme Court stated that *petitioner* gave Simmons the watch (*Strickler v. Commonwealth*, 404 S.E.2d 227, 230 (Va.), *cert. denied*, 502 U.S. 944 (1991)), a flat misstatement of the record entitled to no deference under 28 U.S.C. 2254(d); *cf. Yates v. Evatt*, 500 U.S. 391, 410 (1991) (rejecting state court's characterization of evidence as "not supported by the record")).

bility ("could"), because "[h]air identification is not a positive means of identification. By that I mean I cannot definitely say that a hair originates from a certain individual to the exclusion of all other people in his or her race group * * *." *Id.* at 134. The same prosecution expert also testified that the great bulk of Caucasian hairs found at the scene (mostly in the blue baseball cap found near the victim's clothes and Henderson's wallet) "could *not* have originated" from petitioner. *Id.* at 137 (emphasis added). Another forensic expert reported that she found human blood stains on a pair of blue jeans seized (at Donna Tudor's instigation) from the residence of petitioner's mother; one such stain could be identified as type "O." Id. at 123, 125-26. While that was the victim's blood type, it also is *petitioner's*. *Id.* at 122.[7] Other forensic experts established petitioner's presence in the blue car. It was essentially undisputed that petitioner openly possessed the car while he cohabitated with Donna Tudor for several days *after* the murder. *Id.* at 94, 115, 129.[8]

[7] The Commonwealth also introduced expert testimony that some clothing worn by petitioner (to which Donna Tudor led them, after the two cohabitated for a week) contained semen stains. J.A. 410; Trial Tr. 706-07. Because vaginal swabs taken from the victim had shown the presence of semen, the prosecution evidently had hoped to suggest that petitioner had raped the victim. That tactic fizzled when the victim's boyfriend, John Dean, admitted that he and the victim had consensual sexual relations the night before she disappeared (J.A. 20), and the Commonwealth' pathologist testified that petitioner could *not* be the source of the semen found in the victim. Trial Tr. 715-16. In summation, the prosecutor disclaimed any contention that *petitioner* had raped Whitlock, but argued that the semen was probably Henderson's, who could not be tested because he was a fugitive. J.A. 165-66. On that basis, the prosecutor urged the jury to conclude that the abduction related by Stoltzfus was motivated by an intent to defile Ms. Whitlock. *Id.* at 165 ("they did it so that one or both men could rape her").

[8] A defense witness, Kenneth Workman, testified that Ronald Henderson arrived at Workman's house at around 4:30 a.m. on January 6th, completely drunk and "talking about [how] *he* killed" someone to whom he referred with a racial epithet. J.A. 139 (em-

In closing, the prosecutor stressed at the outset Stoltzfus' testimony, highlighting her account of Ms. Whitlock's abduction as something that could "not be disputed beyond any doubt, beyond any question at all." J.A. 165. The prosecutor also stressed how "lucky" the jury was "to have an eyewitness who saw what happened out there in that parking lot." *Id.* at 169. And he expressly relied on Stoltzfus' detailed account to urge the conclusion that petitioner must have subdued Ms. Whitlock with a knife. *Id.* at 170. The jury found petitioner guilty of capital murder.

2. ***State Appellate And Collateral Review***

1. The Supreme Court of Virginia affirmed petitioner's conviction and death sentence on direct appeal. *Strickler v. Commonwealth*, 404 S.E.2d 227 (Va.), *cert. denied*, 502 U.S. 944 (1991). Among other assignments of error, the court rejected petitioner's claim that the trial court should have granted his motion for a bill of particulars. The court explained that "[l]imited discovery is permitted in criminal cases by the Rules of Court," but that petitioner "had the benefit of all the discovery to which he was entitled under the Rules." *Id.* at 233 (citing Rule 3A:11).[9] The court also upheld petitioner's death sentence on the ground that the jury properly found

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phasis added). Henderson "had blood and stuff on his pants." *Ibid.* The prosecutor's cross-examination highlighted the fact that Henderson was intoxicated, implicitly suggesting that his assertions were unreliable. *Id.* at 141. At Henderson's later trial, however, the prosecutor called Workman as the Commonwealth's witness to prove Henderson's guilt of the murder.

[9] Rule 3A:11, which applies "to prosecution for a felony in a circuit court," governs the discovery available to criminal defendants. It provides for inspection by the accused of evidence "material to the preparation of his defense [if] the request is reasonable," but it expressly shields from discovery "statements made by the Commonwealth witnesses or prospective Commonwealth witnesses or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case" (other than certain scientific expert reports prepared in connection with the investigation).

"future dangerousness" and "vileness." For both factors, the court relied heavily on its assesment of petitioner's role in the victim's abduction and murder. With respect to the former, the court found "[m]ost significant[] [that] the jury had before it [petitioner's] violent behavior before and during the commission of the present crime" as well as the subsequent conduct and statements related by Donna Tudor. *Id.* at 236. As to the latter, the court emphasized the horror experienced by Ms. Whitlock during the abduction and while contemplating her impending death. *Id.* at 237.

2. In state habeas corpus proceedings, petitioner alleged that trial counsel were ineffective for not formally seeking *Brady* materials at trial. Respondent countered with the affidavit of petitioner's trial counsel who stated that "[w]e were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files * * *." J.A. 223. Based upon that representation, respondent argued that because "counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion." *Id.* at 213. Petitioner also contended that trial counsel were constitutionally defective in failing to object to an instruction that permitted the jury to convict him of capital murder on the basis of two underlying offenses, one of which—"abduction * * * with the intent to defile"—could not, under applicable law, support a capital murder conviction. *Id.* at 209. Respondent agreed that "abduction with the intent to defile is not one of the predicate felonies for capital murder," but argued that the overbroad instruction "was not prejudicial" because "the jury unanimously found beyond a reasonable doubt that [petitioner] was guilty of robbery while armed with a deadly weapon." *Id.* at 218. Finally, petitioner claimed that the trial court erred by not ordering discovery. Respondent asserted that this issue had already been resolved on direct appeal. The circuit court granted respondent's motion to dismiss the habeas corpus petition. *Id.* at 247-48.

The Supreme Court of Virginia granted review "limited" only to the issues arising from the concededly defective "intent to defile" instruction. *Strickler v. Murray*, 452 S.E.2d 648, 648-49 (Va.), *cert. denied*, 516 U.S. 850 (1995). That court rejected petitioner's ineffective-assistance claim on the ground that he could not show "prejudice," since the jury had *also* been instructed in the alternative on armed robbery, a permissible predicate for capital murder. The court again placed substantial reliance on the probative force of Stoltzfus' testimony to conclude that there was "overwhelming" evidence that petitioner killed Ms. Whitlock "in the commission of a robbery while armed with a deadly weapon." *Id.* at 652-53 (summarizing Stoltzfus' account of how petitioner burst into "the car that Leanne was driving" and "repeatedly struck her").

B. Federal Habeas Corpus

1. In federal district court, petitioner sought and received an ex parte order permitting his counsel to examine and copy all police and prosecution files in the case. That order led to the discovery of letters written by Stoltzfus and of notes and reports prepared by Detective Claytor of the Harrisonburg Police Department—the lead investigator in the case—that reflected statements made by Stoltzfus over the course of the investigation. Those documents were found in the files of the Harrisonburg Police Department, and it is undisputed that most of them (five out of eight) were not in the "open file" that had been tendered by the prosecutor in purported compliance with the government's discovery obligations. J.A. 400-01. The district court concluded that respondent could not rely on procedural default rules to preclude consideration of petitioner's ensuing *Brady* claim, either because "[d]efense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout [p]etitioner's state habeas proceedings," or, alternatively, because petitioner's trial counsel were ineffective in failing

to move for disclosure of *Brady* materials at trial. *Id.* at 287, 276-79.

After carefully reviewing the newly discovered documents, the district court concluded that they "contradicted or impeached [Stoltzfus'] trial testimony in many crucial respects." J.A. 387. Among other things, those documents made clear that Stoltzfus initially could not identify Ms. Whitlock, and that Stoltzfus' subsequent in-court identification resulted from her extensive exposure to Ms. Whitlock's photographs during a lengthy private meeting with the victim's boyfriend, John Dean. Those documents also revealed that Stoltzfus initially was not sure she could identify the white males and that, far from positively identifying petitioner from a photo spread, she merely stated that he "resembled" one of the men she had seen. Indeed, at first she could not even recall having been present at the Mall *at all* on January 5th. *Id.* at 389.

The documents also reflect how crucial details of Stoltzfus' in-court testimony emerged—amidst her admissions of faulty memory and of reliance on the recollections of another—only as Stoltzfus met for several hours with the victim's boyfriend and, on numerous occasions, also with Det. Claytor, thus powerfully suporting the conclusion that her trial testimony resulted from suggestion, fabrication or confabulation. Because the record made clear the trial prosecutor's extensive reliance on Stoltzfus' account to establish the key predicates of his entire case against petitioner (*i.e.*, "the alleged abduction" and "the armed robbery"), the district court concluded that "[t]he undisclosed evidence 'put the whole case in such a different light as to undermine confidence in the verdict.' " J.A. 396 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). The court accordingly granted petitioner federal habeas corpus relief.

2. The Fourth Circuit reversed. J.A. 403-34. The Fourth Circuit noted that federal habeas courts generally may not entertain a constitutional claim that has never

been presented to the state courts, and which those courts would *now* refuse to entertain if asked to do so, unless the habeas petitioner establishes "cause" and "prejudice." J.A. 414 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)). The court believed that Virginia courts would now refuse to entertain petitioner's *Brady* claim under a state rule that precludes a "successive" state habeas petition that is based on a claim that was "available" to the applicant when he first sought state habeas relief. *Id.* at 421. According to the court, petitioner's *Brady* claim was "available" to him when he sought state collateral relief, because "reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files * * *." *Ibid.* (citing Virginia Supreme Court Rule 4:1(b)(5), which permits discovery of non-privileged materials but only with prior leave of court).

The court then concluded that petitioner could not show the type of "cause" and "prejudice" needed to excuse his failure to raise the *Brady* claim in state court. Because the claim was "available" to petitioner by filing a discovery motion, the Fourth Circuit reasoned, he could not rely on this Court's cases holding that "cause" is established whenever state officials interfered with a defendant's timely assertion of his claim in state court, or whenever the basis for the claim was not "reasonably available" to counsel during earlier state proceedings. J.A. 422-23. Nor, the court concluded, could petitioner rely on this Court's cases holding that "cause" is established by ineffective assistance of counsel, since "[i]n light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion." *Id.* at 424. In any event, the court stated, petitioner cannot establish "prejudice" because "the Stoltzfus materials would have provided little or no help to" petitioner. *Id.* at 425. The court based that assertion on the fact that, at trial, petitioner "never contested that he abducted and robbed Whitlock" and "argued to the jury during the guilt phase that they

should convict [him] of first degree murder rather than capital murder." *Ibid.* For the same reasons, the court further held, "[e]ven if we could get beyond * * * procedural default, * * * Strickler's *Brady* claim fails on the merits." *Id.* at 425-26, n.11.

SUMMARY OF ARGUMENT

I. The Commonwealth clearly violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1983), by suppressing highly material exculpatory evidence. That evidence was in police files but was not disclosed to the defense. Indeed, even the prosecutor saw the dispositive documents for the first time when they surfaced in petitioner's federal habeas proceeding.

The suppressed materials demonstrate that the Commonwealth's key witness—Anne Stoltzfus, who vividly claimed at trial to have witnessed how the murder victim was forcibly abducted by petitioner and others at a shopping Mall—initially and in a later series of meeting with a police detective: (a) had no memory of the victim's *or* of petitioner's appearance; (b) did not remember even being at the Mall on the relevant date; (c) could give little detail concerning the appearance or clothing of the people involved in the incident she purportedly witnessed; (d) gave inconsistent descriptions of the victim's car; (e) omitted practically every key detail she later invoked in her trial testimony; and suddenly (f) "remembered" a wealth of incriminating detail—and was able to identify the victim—only after meeting for several hours with the victim's boyfriend, with whom she compared notes and reviewed photographs of the deceased. The suppressed materials strongly support the conclusion that Stoltzfus' trial testimony was, in large part or in whole, a complete fabrication embroidered with the help (or at the suggestion) of a law enforcement officer and the victim's boyfriend. Had those materials been disclosed to the defense, they would have furnished a meritorious basis for excluding Stoltzfus' identification testimony in its entirety, or (at

the very least) would have fueled a withering cross-examination exposing the utter unreliability of her testimony.

The materiality of the Commonwealth's violation of *Brady* cannot reasonably be disputed. Stoltzfus ostensibly was a disinterested civilian witness with no stake in the outcome, who at trial claimed to have an "exceptionally good memory" and who delivered detailed, gripping testimony with absolute certainty. Such testimony would leave an indelible impression on *any* jury, and it clearly snuffed out any hope petitioner ever had of fairly defending against the Commonwealth's charges. Because petitioner was indisputably seen in open possesion of the victim's car *after* the murder, Stoltzfus' false testimony that she "absolutely" saw him forcibly break into the car and abduct the victim in it effectively extinguished his defense, reducing every other piece of evidence presented by the Commonwealth to a merely corroborative or interstitial role. Indeed, apart from Stoltzfus there was *no* reliable evidence that petitioner was in the victim's car on the date of the murder *while the victim still lived*, and a jury could have concluded that petitioner acquired the car *after* the killing from co-defendant Henderson and Commonwealth witness Donna Tudor. The materiality of the non-disclosures is particularly obvious with respect to petitioner's death sentence, because Stoltzfus clearly manufactured the factual support for *armed* robbery—the sole remaining predicate for petitioner's capital murder conviction.

II. Petitioner clearly established both "cause" for not raising his *Brady* claim in the state courts and prejudice from the constitutional violation. Because *Brady* already requires a showing of materiality, petitioner's meritorious *Brady* claim establishes that he has suffered the requisite "prejudice." And given the Commonwealth's repeated assertions that it had an "open file" discovery system—*i.e.*, a system wherein all discoverable material is placed in the prosecutor's "file" and made available for inspection by

the accused—petitioner had every right to expect that *Brady* material would be made available in that "open file." Those "open file" assertions by the Commonwealth effectively concealed the existence of petitioner's *Brady* claim, and thus are precisely the type of "external impediments" to the defense that clearly establish "cause" under this Court's cases. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1988).

ARGUMENT

I. THE STATE VIOLATED *BRADY* AND ITS PROGENY BY FAILING TO DISCLOSE EVIDENCE THAT WOULD HAVE DESTROYED THE CREDIBILITY OF A KEY PROSECUTION WITNESS

A. This Court's Cases Clearly Require The Prosecutor To Disclose Any Material Impeachment Evidence Within The Possession Of The Investigating Authorities

As this Court recently noted, "[t]he prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation * * *." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). In cases such as *Mooney v. Holohan*, 294 U.S. 103 (1935), *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Alcorta v. Texas*, 355 U.S. 28 (1957) (*per curiam*), this Court recognized time and again that governmental deception of the court and jury, or knowing suppression of evidence favorable to the accused, was conduct inconsistent with the most "rudimentary demands of justice." *Mooney*, 294 U.S. at 112; *see also Napue v. Illinois*, 360 U.S. 264 (1959). Today, that principle "is of course most prominently associated" (*Kyles*, 514 U.S. at 432) with this Court's landmark decison in *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Brady*, this Court explained that "[t]he principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to

the accused." 373 U.S. at 87.[10] Because suppression of evidence that "would tend to exculpate him or reduce the penalty" results—even when suppression "is 'not the result of guile' "—in a proceeding "that does not comport with standards of justice," the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87-88. And the Court soon made clear that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 269); *see also Moore v. Illinois*, 408 U.S. 786, 794-97 (1972).

After *Brady*, questions persisted about the limits of the government's obligation to reveal favorable information, and the degree to which that obligation might depend upon an affirmative request by a defendant. In *Giles v. Maryland*, 386 U.S. 66, 75 (1967), for example, the Court vacated the defendants' rape convictions, despite absence of any pre-trial request for exculpatory evidence, where evidence that emerged in collateral attack showed that the testimony of the prosecutrix and a purported eyewitness was "open to the construction that these key witnesses deliberately concealed from the judge, jury, and defense counsel evidence of the girl's promiscuity." *Id.* at 75 (plurality opinion); *see also id.* at 102 (Fortas, J., concurring) ("I see no reason to make the result turn on the adventitious circumstance of a request").

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[10] *Brady* involved the suppression of evidence favorable to the accused in the punishment phase of his capital trial, namely the nondisclosure of a codefendant's admission that he, not Brady, had actually killed the victim. *Brady*, 373 U.S. at 87; *see also Alcorta*, 355 U.S. at 32 (finding due process violation where false evidence that was offered at trial precluded an affirmative defense which, if successful, would make death an impermissible punishment).

In *United States v. Agurs*, 427 U.S. 97 (1976), it "became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation." *Kyles*, 514 U.S. at 433; *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988). *Agurs* distinguished between, and assigned increasingly strict standards of materiality to, claims involving knowing use of perjured testimony by the prosecution, failure of the prosecution to honor a specific defense request, and failure to "volunteer exculpatory evidence never requested, or requested only in a general way." *Kyles*, 514 U.S. at 433. Even in the third category—where a general request or no request at all had been made—*Agurs* "found a duty [to disclose] on the part of the Government . . ., though only when suppression of the evidence . . . 'result[ed] in the denial of the defendant's right to a fair trial.' " *Kyles*, 514 U.S. at 433, *quoting Agurs*, 427 U.S. at 108; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) (*Agurs* "held that a prosecutor must disclose unrequested evidence which would create a reasonable doubt of guilt that did not otherwise exist"). Finally, in *United States v. Bagley*, 473 U.S. 667 (1985), this Court "abandoned the distinction between the second and third *Agurs* circumstances." *Kyles*, 514 U.S. at 433. In its place, *Bagley* established a common materiality standard that would apply to all favorable evidence, exculpatory or impeaching, whether the defendant made a specific request, a general request, or no request at all. *Ibid.*

Thus, it is now well estabilshed that "the constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence," rather than by the type of request, if any, submitted by a defendant. *Kyles*, 514 U.S. at 434. Because this Court has entrusted the prosecutor with the responsibility, in the first instance, of assuring compliance with the dictates of *Brady*, each "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's

behalf in the case, including the police." *Id.* at 437. As the Court emphasized in *Kyles*, "whether the prosecutor succeeds or fails in meeting this obligation * * *, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id.* at 437-38.

B. Because The Commonwealth "Suppressed" The Records Reflecting Stoltzfus' Pre-Trial Statements To Detective Claytor, Which Were Clearly "Exculpatory" And "Material," *Brady* Compels A New Trial

The district court correctly concluded that each of the three requirements of the *Brady* rule—exculpation, materiality and suppression—is fully established by the record in this case. Viewed collectively the suppressed materials demonstrate that Stoltzfus—quite probably at the suggestion or urging of police and/or those close to the victim—constructed *post hoc* the testimony she delivered at petitioner's trial, belatedly invented the crucial details necessary to support an inference of armed robbery, and had no original recollection of even being at the Mall on the night Ms. Whitlock disappeared. If disclosed to competent counsel, those materials would have destroyed the credibility of Stoltzfus—a purportedly reliable "eyewitness" who, as far as the jury knew, was testifying solely out of a pristine sense of civic duty. Stoltzfus' multiple asserted observations of the alleged kidnappers, her detailed and vivid account of every facet of the abduction, and the absolute certainty of her in-court identification of petitioner rendered every other item of evidence essentially irrelevant, save for petitioner's undisputed *later* possession of the stolen car. Indeed, in light of petitioner's open possession of the stolen car, Stoltzfus' indelible testimony relegated the balance of the Commonwealth's case to a corroborative, interstitial role. Any jury faced with such testimony from an ostensibly impartial

and unwavering "eyewitness," if told that the defendant had the victim's car and that the victim's violent death occurred in the interim, would likely consider nothing more before connecting the proverbial dots.

1. *Stoltzfus' Pre-Trial Statements Were Exculpatory*

1. "[T]he time-honored process of cross-examination [i]s the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981). By exposing a witness' faulty memory, suggestibility, mendacity, bias, partiality or other motive for testifying, "the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit the witness." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). "[M]aking the jury aware of the inconsistency" between a witness' earlier statements to the authorities and her trial testimony not only is a time-honored means of accomplishing that end, but it also undoubtedly "*enhances* the truth-seeking function of trials and will result in more accurate verdicts." *United States v. Mezzanatto*, 513 U.S. 196, 204-05 (1995) (emphasis in original). And nowhere is such impeachment more crucial to the fairness of the outcome than in cases in which the prosecution relies on identification evidence, because "the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." *Watkins v. Sowders*, 449 U.S. at 347 (emphasis in original).

2. The Stoltzfus materials were clearly exculpatory because they contained evidence crucially relevant to the reliability of Stoltzfus' identification testimony, including evidence suggesting that Det. Claytor (the police investigator) and John Dean (the victim's boyfriend) shaped and manicured Stoltzfus' trial testimony.

Claytor began a series of consultations with Stoltzfus on Friday, January 19, 1990—Claytor and she met twice

that day. In his handwritten notes of the first meeting of the day, Claytor recorded references to a "[c]ar that may have been" in front of her car and to "fighting" somehow associated with it; those notes record that Stoltzfus could *not* identify Whitlock *or* petitioner ("Can't ID B/F 1st W/M"), and reflect virtually *no* descriptive detail next to notations corresponding to "white female" and "second white male." J.A. 306 (Exhibit 1). In an account entitled "Observations" and handwritten by Stoltzfus herself at that interview, she refers to a "[b]lack girl parked in front of" the Mall entrance "in a dark blue 'new' sports car" with West Virginia tags. *Id.* at 311 (Exhibit 3). The "black girl" was joined by a "scroungy 'bum type', 'W. Va hick' with scraggly blondish hair" who pound[ed] impatiently" on the "passenger window" and then opened the door and jumped in. The black girl "start[ed] hitting the guy" and he "back[ed] out." *Id.* He waved to another "girl and guy," who ran toward the car. The driver honk[ed] continuously; then "Guy # 1 + Black girl start[ed] fighting again." *Id.* at 312. Stoltzfus drove past the blue car, but the black girl "just stare[d] straight ahead. Girl in the back seat star[ed] at me." As Stoltzfus "dr[o]ve[] on" to park and "see if the black girl is O.K.[,] * * * [the black girl] dr[o]ve[] the car past me[.] * * *. They look[ed] normal." *Ibid.*

At a second meeting later that day, Stoltzfus reviewed police photo spreads and indicated that one of the white males "[r]esemble[d]" Henderson, but that she was "[n]ot sure." She also stated that a photograph of petitioner "[r]esemble[d]" the other male. J.A. 307. Thus, in a handwritten account and two police interviews given closest in time to the alleged abduction, when her memory of the disturbing events was presumably freshest, Stoltzfus could *not* positively identify *any* of the participants. And, among other things, she did *not* say that: (a) she had written down, much less memorized, the license plate number of the blue car; (b) she had (literally) run into the three

subjects in the Musicland store or otherwise observed them at length earlier; (c) she had a detailed memory of their clothing, including whether such clothing was soiled at the time; (d) in bumping into one of the subjects she felt a "hard" object in his coat, the purported knife with which the victim was later subdued; (e) when the second male and the white female got into the car, the second male passed his coat over the seat to the first white male; (f) she noticed the subjects trying to get into other cars in the parking lot; (g) she got out of her car and approached the girl's car; (h) the girl in the car kept looking down to her right (as if at a knife), or that (i) the girl in the car mouthed the word "help." What Stoltzfus did say, in her own words, was that "[t]hey look[ed] normal."

Claytor interviewed Stoltzfus again on Monday, January 22, 1990. J.A. 307. On that date, Stoltzfus also wrote a letter to Claytor from which it is clear that she had not remembered being in the Mall *at all* during her initial interviews, and had manifested "confusion" to Claytor in her previous meetings with him:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Id. at 313. Stoltzfus apologized to Claytor for her "initial times [being] so far off," explained that she "placed the time around 9:00 p.m. thinking [she] must have not gone in because the Mall was closing," and then said that her new certainty about dates and times was based upon what her daughter and someone at the Mall had told her. *Ibid.* (Exhibit 3). She also recalled visiting Musicland and only *later*, "[o]n the way back from Musicland," seeing a "revved up mountain man" yelling at a

woman that he would meet her at a bus-stop; he "*could* have been the same guy who knocked on the [victim's] car window." *Id.* at 315 (emphasis added). Finally, she related "a very vague memory that [she was not] sure of": "It seem[ed] as if the wild guy that [she] saw" earlier had run up to a bus, missed it, and then approached the blue car. *Id.* at 316. "Were those 2 memories the same person?," she asked Claytor. *Ibid.*[11] This letter continues to reflect deep uncertainty about identification, omits any claim of having carefully observed the subjects such as those she later invoked to bolster her detailed in-court testimony, and still contains no description of the black female—and no mention, much less memory of, any license plate number.

Claytor's files include an undated, typed, document from Stoltzfus entitled "Notes for Det. Claytor: My Impressions of 'The Car' (Anne Stoltzfus)." J.A. 317 (Exhibit 5). Abandoning her previous claim that the blue vehicle had been a "sports" car, she now described it as "a standard boxy American style" and she *thought* "it was a two-door." *Id.* at 318. She had a "*vague impression*" of other details, but she was "not at all sure." *Ibid* (emphasis in original). She did not know the make, though she "remember[ed] looking for [it] and *not being able to see it in the dark.*" *Ibid.* (emphasis added).[12] Stoltzfus again did not mention that she had written down or knew

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[11] In a handwritten post-script, Stoltzfus added that her daughter, who supposedly was with her at the Mall, did not "remember seeing the 3 people get into the black girl's car." *Id.* at 317.

[12] According to Claytor's notes, on January 24, 1990, Stoltzfus was taken to the county impound lot and shown the victim's vehicle, a "Mercury Lynx, W. Va. license NKA-243." J.A. 310-11 (Exhibit 2). Stoltzfus said that "the vehicle looked like the one at the Valley Mall," it "was the right color and size, it had the same little blue stripe down the side, and it had the same colored interior." *Id.* at 311.

the vehicle's license plate number, or that she had any specific memory about the car's driver.

That began to change with Stoltzfus' handwritten note to Claytor dated January 25, 1990, at 1:45 a.m. She then stated that she had "identified' beyond a shadow of a doubt that the black girl I saw 1/5/90 was LeAnn Whitlock." J.A. 318 (Exhibit 6). Stoltzfus' note said she had "spent several hours" with the victim's boyfriend, John Dean, looking at his photographs of Ms. Whitlock "from which [she] made the identification." *Ibid.* An additional comment in the note, comparing Dean's description of a "girl in jail" with Stoltzfus' own recollection, also indicates that Stoltzfus and Dean spent some time that evening exchanging impressions about the evidence so far developed by the authorities. *Ibid.* Later that day, Claytor wrote in a report that Stoltzfus had—"without a doubt"—identified Whitlock as the person she had seen "operating the blue vehicle." He added that she had also identified the victim's car and had "advised" that "[s]he had made up a quote to help remember the license number after the incident. 'No Kids After 2-43.'" *Id.* at 311. That was the *first* time Stoltzfus ever mentioned the license plate number.

Stoltzfus' extended visit with the victim's boyfriend unleashed a veritable torrent of additional—and highly incriminating—"memories" that Stoltzfus duly conveyed in additional missives to Claytor. By letter dated January 26th, Stoltzfus for the first time advised Claytor of: (a) the events at Musicland, including her brush with the "dark-haired quiet guy" and his "long tan light-weight coat"; (b) descriptions of the subjects' clothing and of purported conversations amongst them; (c) a detailed description of the blonde woman, and (d) that Stoltzfus had witnessed a crime. J.A. 319-22 (Exhibit 7). Stoltzfus thanked Claytor for his "patience with [her] sometimes muddled memories," and stated that but for Claytor's inter-

vention she "never would have made any of the associations that [he] helped [her] make." *Id.* at 321.

A later three-page, undated memorandum from Stoltzfus, entitled "Details of Encounter With Mountain Man, Shy Guy & Blonde Girl," expounds in still greater, vivid detail about the events of January 5th. It is in that memorandum that Stoltzfus sets forth for the first time numerous additional facts about the abduction, including (a) the passing of the tan coat from the occupants of the back seat to "Mountain Man"; (b) the fact that the victim "would meet [Stoltzfus'] eyes and then purposefully look down to her right side"; and (c) the fact that the victim "mouthed 'Help.'" It is the version of Stoltzfus' story that comes closer than any of her previous attempts to the chilling version of the abduction she later related at trial. J.A. 322-27 (Exhibit 8).

3. The circumstances surrounding the development of Stoltzfus' story tellingly expose the deception that she practiced on the court and jury that convicted petitioner. Indeed, even a brief comparison of portions of Stoltzfus' trial testimony to her initial statements in the undisclosed documents illustrates the unreliability of her testimony and demonstrates why a jury would never credit her account after a proper cross-examination.

TRIAL TESTIMONY	WITHHELD DOCUMENTS
"I have an exceptionally good memory."	"I have a very vague memory that I'm not sure of." Exh. 4 at 3.
Asked if at the time she first spoke to the police she told them what she "just told" the jury, Stoltzfus said, "I told the police exactly what I saw, right."	After the first 3 interviews, Stoltzfus wrote "to clarify some of [her] confusion," stating that she (a) did not remember being at the mall, (b) did not remember going inside the mall, and (c) thought she was there around 9:00, after closing time. Exh. 4.

Stoltzfus thanks Claytor for his "patience with [her] sometimes muddled memories." States that she "didn't believe [a crime was] what I saw until I saw LeAnn's pictures" at John Dean's. Tells Claytor that, left to her own devices, she "never would have made any of the associations that you helped me make." Exh. 7.

When first interviewed by Claytor, she "gave detailed descriptions of the three persons."

Notes of first interview state: "Can't ID B/F 1st W/M." Those notes contain no description of physical features or clothing of black female or first white male. Stoltzfus states that photo of Henderson "resembles" one suspect but that she is "not sure." She also states that photo of petitioner "resemble" (sic) suspect." She describes second white male as "tall" with "dark hair" and "cream jacket." States "Can ID W/F" who was "5'05"—140 (Little over weight)" wearing "blue jean" with "brown hair shoulder" "plain face (pail) [sic]." Exh. 1.

"I was very sure of the two white men I was shown," that she picked them "with absolute certainty," and had a "slight reservation" about the white woman.

"I was shown 'Mountain Man' on Friday afternoon and I was one hundred percent sure . . ." "I have absolutely no doubt of my identification."

She describes man who approached car as "[s]croungy 'bum-type", "W.Va. hick" with long scraggly blondish hair." No mention of clothing or other physical features of first white male. Exh. 3 at ¶ 1.

Stoltzfus told the jury she "[a]bsolutely" got a good look at the black woman she saw drive pass her and who was then abducted. She described the woman as a "rich college kid,"

Claytor's notes state that Stoltzfus "can't ID B/F." She did not describe her clothing. Exh. 1.

Stoltzfus wrote that she "spent several hours with John Dean [the victim's boyfriend'] looking

"beautiful," "well dressed," "happy," "singing," and "bright eyed."

Stoltzfus testified that she followed the car, told her daughter to write the license plate number on a 3×4 index card, and used the trick "No Kids Alone 243" to remember the number.

at current photos from which I made the identification [of victim]." Exhh. 6.

Claytor's notes of first interview contain no mention of license number, state of registration, or daughter recording number. Exh. 1.

Stoltzfus' own handwritten "observations" describe a " 'new' sports car" and omit license plate number, trick for recalling it, and daughter's recording number on a card. Exh. 3.

Letter of 1/22/90 states only that car was "dark blue" with "West VA tags" and omits license plate number, trick for recalling it, and daughter's recording plate number. Exh. 4.

In undated "My Impressions of 'The Car,' " the car was "dark blue (navy) and shiny" and "a standard boxy American style." She relates "*vague impressions*" and features she "*think*[*s*]" it had but is "not at all sure." No mention of license plate or number. Exh. 5.

Two days after Claytor showed Stoltzfus the car, and one day after spending several hours with its owner viewing pictures of the victim, she "remembered the license number" which she previously "could block out." Exh. 7 at 1.

Stoltzfus stated that she first saw the man she identified as petitioner when she entered the Musicland store. She gave a

Initial interviews with Claytor make no reference to Musicland or to any encounter with the suspects there. Exhs. 1, 3.

detailed description of what she said Strickler was wearing and identified a shirt (CW Ex. 7) as like the one she saw. Asked if she "g[ot] a good look at both of [the males]" at the time of the first encounter in the record store, Stoltzfus testified, "Oh, yes, I certainly did." She described one of the men as "revved up" and impatient. She testified that she tried to follow the "Mountain Man" but "lost" him.

Letter to Claytor of 1/22/90 described time spent in Musicland ("Wasted 10-20 min. trying to get help to find the CD") but does not mention encounter with three people. Only mentioned seeing "mountain man" "[o]n the way back to Musicland the 2nd time." Thinks she remembers seeing "the wild guy" run up to a bus then to the black girl's window." Asks, "were those 2 memories the same person?" Also states that daughter did not remember "seeing the 3 people get into the black girl's car." Exh. 4.

4. In sum, the Stoltzfus documents starkly reveal "the evolution over time of [her] description" (*Kyles*, 514 U.S. at 444) and her increasing ability to "remember" incriminating details with each meeting with Claytor, who was familiar with the investigation and was clearly in a position to suggest what details might be useful for Stoltzfus to "remember." They also reveal how she underwent an amazing epiphany following a meeting of "several hours" with the victim's boyfriend, comparing notes and "looking at current photos from which [she] made [her] identification of the victim." Indeed, the undisclosed documents reveal that Stoltzfus' testimony not only evolved to fit nearly seamlessly with the circumstantial testimony of other Commonwealth witnesses—such as a security employee of the Mall who believed she had seen petitioner there earlier in the afternoon of January 5th, J.A. 28—but that her testimony was tailor-made to support the armed robbery and abduction predicates required for petitioner's capital conviction. Once disclosed, those materials would have supported a meritorious motion to exclude Stoltzfus' identification testimony as wholly unreliable, *see, e.g., Manson v. Brathwaite*, 432 U.S. 98, 114-17

(1977), or, at the very least, "would have fueled a withering cross-examination, destroying confidence in [her] story and raising a substantial implication that the [authorities] had coached [her] to give it." *Kyles*, 514 U.S. at 443 (footnote omitted). It cannot be doubted that those materials were therefore clearly "exculpatory" within the meaning of *Brady*.

2. *Stoltzfus' Pre-Trial Statements Were Material*

It is beyond dispute that "evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433-34 (citation omitted). It is equally clear that "materiality * * * is not a sufficiency of the evidence test," and thus "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. As in other contexts in which courts are called upon to assess how a jury may have been affected by a deviation from legal norms, the materiality determination must be consistent with the Sixth Amendment, which secures to criminal defendants the right to trial by jury. "Th[is] right includes, of course, as its most important element, the right to have a jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (discussing Sixth Amendment constraints on harmless error review); *see also California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring) (same). In view of that constitutional constraint, what the materiality standard demands is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. That is undoubtedly true here.

1. Any assessment of the materiality of the Stoltzfus documents must begin with, and bear in mind throughout, the almost incomparable impression that an unhesitant in-court identification by an unbiased eyewitness will naturally have upon a jury. Without hesitation, Stoltzfus testified in great detail to her multiple contacts with the alleged kidnappers "close-up and with the sun high in the sky" (*Kyles*, 514 U.S. at 466 (Scalia, J., dissenting)), even *before* the abduction allegedly occurred that evening. She thus gave the jury a basis—flawed, as it turns out—for believing that Stoltzfus' observations were careful and most unlikely to be wrong. She also quite distinctly—and falsely—conveyed to the jury that she had told a consistent story from the beginning, including that she was "one hundred percent sure" (J.A. 56) of her identification of petitioner from police photographs on the very *first* day she was interviewed by the authorities. With the exception of a full confession or a videotape of the crime, it is difficult to conceive of evidence to which a jury would be more likely to give credence than the type of account by a purportedly disinterested witness that Stoltzfus placed before the jury. Here, as with a full confession, a jury "doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case." *Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring in judgment).

That is especially true here because the Commonwealth had little evidence of petitioner's guilt that could fairly be said to be *independent* of, or otherwise unaffected by, Stoltzfus' gripping account. Quite simply, the Commonwealth had *no* reliable evidence, apart from Stoltzfus, that petitioner was in the blue car *at all* on January 5th while Ms. Whitlock still lived. For that reason, Stoltzfus' account was the starting—and the most compelling—premise of the Commonwealth's entire evidentiary presentation. If the jury credited Stoltzfus' vivid account of the abduction (and the separate jury verdicts finding petitioner

guilty of abduction and unarmed robbery show that it did), it is inconceivable that the jury would not find him guilty of killing Ms. Whitlock based solely on his later possession of the victim's stolen car. Conversely, excluding (or, at least, deeply discounting) Stoltzfus' testimony would leave the jury with a circumstantial case primarily centering on petitioner's acquaintanceship with Henderson and on inconclusive physical evidence—and with the need to consider the implications of Stoltzfus' coached testimony for the integrity of the entire investigation. *Kyles*, 514 U.S. at 445. The incriminating testimony of Donna Tudor, who (a jury could easily conclude) in all likelihood was herself an accomplice in the Whitlock killing and one of the persons from whom petitioner probably obtained the car, could not make up the credibility deficit of that circumstantial case. That point was not lost on the prosecutor when, in summation, he emphasized Stoltzfus' testimony at the outset and throughout as one of the givens in the case—or when, at Henderson's later trial, he dispensed entirely with Tudor (but not Stoltzfus) as a witness.[13]

2. As plain as the materiality issue is with respect to the guilt phase, materiality is even more devastatingly clear with respect to punishment. Petitioner was con-

[13] Much of the evidence pointed directly to Henderson, rather than petitioner, as the murderer. Henderson's wallet, and a significant quantity of Caucasian hair that could not have originated from petitioner, were found near the body. J.A. 87, 137. On the night of the murder, Henderson told a friend, Workman, that he had killed someone, whom he described with a racial epithet. Workman saw blood on Henderson's clothes. *Id.* at 139. On the night of Ms. Whitlock's disappearance, Henderson (not petitioner) gave her watch to a woman in a bar. *Id.* at 82. Blood was found on Henderson's jacket and his jeans had substantial, visible blood stains. *Id.* at 139. A jury unexposed to Stoltzfus' unreliable identifications (or apprised of the high likelihood that her account resulted from suggestion or confabulation) could well conclude that petitioner acquired use of the victim's car, from Henderson or Tudor, *after* the killing.

victed of capital murder on the basis of two predicate crimes, *armed* robbery and abduction with intent to extort or defile. The Virginia Supreme Court held on petitioner's state habeas (and indeed the Commonwealth conceded on state collateral review, J.A. 218) that abduction "with intent to defile" could not legally serve as a predicate for capital murder, because the victim in this case was over the age of 12. Petitioner's capital murder conviction thus must be supported, if at all, on the basis of compelling evidence of *armed* robbery.

The prosecutor's "evidence" of that predicate, however, flowed almost entirely from inferences from Stoltzfus' testimony, particularly her late-blooming recollections of a hard object in "Shy Guy's" coat, the passage of that coat to "Mountain Man" in the front seat (after which the intruders were able to "relax," J.A. 45), and the victim's purported glances to the right. As the prosecutor argued in summation:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. That was pressed right up against Leanne * * *. Mrs. Stoltzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

J.A. 170.[14] Indeed, even if the capital murder conviction could be supported (and it cannot), it is more than rea-

[14] In affirming the denial of state habeas relief, the Supreme Court of Virginia concluded that evidence that Ms. Whitlock's murderer used a *rock* to inflict death was sufficient to establish armed robbery under Virginia law. That theory cannot support petitioner's capital murder conviction, because the theory that the prosecutor actually presented to the jury relied on the presence of a *knife* during the

sonably probable that the devastating impeachment of Stoltzfus' testimony would be sufficient to cause the jury to choose a penalty other than death, especially since it was her testimony—and her testimony *alone*—that portrayed petitioner as the instigator and violent leader in the abduction and armed robbery of Ms. Whitlock, and, by inference, the leader in her murder. It is impossible to say, in these circumstances, that the suppressed documents were not material under *Brady*.

3. The court of appeals nonetheless believed that a different conclusion as to materiality was warranted by its examination of the particular strategy pursued by defense counsel at petitioner's trial. In the Fourth Circuit's view, the Stoltzfus documents could not be considered "material" because petitioner "never contested that he abducted and robbed Whitlock" but argued that the jury should convict him of first-degree, rather than capital, murder. J.A. 425. That analysis fundamentally misconceives *Brady* and its

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abduction, not on the later use of a rock. Under the Sixth Amendment and the Due Process Clause, "appellate courts are not free to revise the basis on which a defendant is convicted." *Dunn v. United States*, 442 U.S. 100, 106-07 (1979); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980) ("we cannot affirm a criminal conviction on the basis of a theory not presented to the jury"). In any event, the "rock" theory in no sense is independent of Stoltzfus' account of the abduction.

Indeed, even if the Commonwealth *had* argued the "rock" theory of robbery to the jury, petitioner's capital murder conviction still could not stand in view of the Virginia Supreme Court's conclusion that the abduction predicate was legally unsound. The jury was told that it could convict petitioner of capital murder on that legally unsound ground, and the prosecutor argued that ground to the jury. J.A. 165. "For all we know, the conviction did rest on that ground," *Leary v. United States*, 395 U.S. 6, 31 (1969), and it is thus insupportable irrespective of *any* factual basis that might exist for the alternative robbery predicate. *Ibid.*; *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error").

progeny. As this Court has recognized, a prosecutor's non-compliance with his *Brady* obligations inherently affects the composition of the trial record, because it shapes the "pretrial and trial decisions" made by defense counsel. *Bagley*, 473 U.S. at 682-83 (plurality opinion). For that reason, "the constitutional duty [to disclose] is triggered by the *potential* impact of favorable but undisclosed evidence," *Kyles*, 514 U.S. at 434 (emphasis added), not by a retrospective examination of how defense counsel were forced to try the case in the *absence* of the exculpatory evidence.

3. *Stoltzfus' Pre-Trial Statements Were Suppressed*

It is conceded that the vast majority of the Stoltzfus records—five out of eight exhibits—were suppressed by the Commonwealth. Indeed, the prosecutor claimed to have seen them for the very first time when they were produced from Det. Claytor's file in response to a federal subpoena. J.A. 365-68. Those concededly withheld documents include Claytor's handwritten notes of his initial meetings with Stoltzfus on January 19th (Exhibit 1; reflecting, *inter alia*, her inability to identify petitioner or the victim); Stoltzfus' handwritten "observations" (Exhibit 3; reflecting, *inter alia*, very little of the incriminating detail she later conveyed to the jury and stating "[t]hey look[ed] normal"); Stoltzfus' January 22nd letter seeking to clarify her "confusion" (Exhibit 4; noting, *inter alia*, that she had not remembered being in the Mall at all, and expressing doubt that "Mountain Man" and "wild guy" she later saw enter the blue car were "the same person"); Stoltzfus' undated "Impressions of the Car" (Exhibit 5; reflecting, *inter alia*, her memory change from "sports" car to a "standard boxy American" car and her lack of awareness of its license plate number); and Stoltzfus' January 25th note to Claytor following her meeting of "several hours" with the victim's boyfriend (Exhibit 6; reflecting, *inter alia*, that Stoltzfus identified the victim after extensive

exposure to her photographs). As the district court correctly concluded, suppression of those documents more than suffices to warrant relief under *Brady*.[15]

C. *Brady* Relief Is Not Limited To Defendants Who Exercise "Diligence" By Refusing To Take The Prosecutor At His Word

The court of appeals also suggested that petitioner's *Brady* claim must fail because he did not seek to compel production of *Brady* materials through legal process. J.A. 421. While that ruling was based on procedural default principles (and is addressed below), the court also appeared to believe that similar considerations might apply to the merits of a *Brady* claim. *Id.* at 425, n.11. There is no room for that sort of "diligence" inquiry under traditional *Brady* principles.

1. The law is clear that "diligence" in filing a motion in court is not an independent requirement of *Brady* and and its progeny. That is the inescapable conclusion from this Court's decision in *Bagley*, which clearly discarded any notion that the accused must "request" exculpatory

[15] In the district court, petitioner submitted affidavits supporting his additional claim (disputed by the prosecutor) that the Commonwealth also suppressed three more documents, Exhibits 2, 7, and 8. Exhibits 7 and 8 are, respectively, Stoltzfus' January 26th letter to Claytor and her subsequent memorandum reflecting for the first time a large number of the incriminating details that she related at trial; they are the last two documents she prepared. Exhibit 2 is a compendium of Claytor's typewritten notes reflecting his investigative steps, including his interviews of Stoltzfus, beginning on January 19, 1990. The district court determined that any dispute concerning the suppression of those three items could not affect petitioner's entitlement to relief. J.A. 392. Even if those three documents had been disclosed (they were not), the concededly suppressed documents—by dramatically illustrating Stoltzfus' early lack of memory and the progression of her testimony that resulted from repeated contact with the investigator—would have cast those three exhibits in a dramatically different light. *Compare Kyles*, 514 U.S. at 443-44, n.14.

evidence in the first place. *Kyles*, 514 U.S. at 433-34. If the doctrine does not even require that the defendant *ask* the prosecutor, it can scarcely be interpreted to require the filing of a formal motion in court. Still less can *Brady* be interpreted to require such a course when, as here, prosecutors have represented that they will provide "open file" discovery. Because this Court's cases clearly place on "the individual prosecutor [the] duty to learn of any favorable evidence known to others acting on the government's behalf in the case," *Kyles*, 514 U.S. at 437, and because this Court's cases presume "that the great majority of prosecutors will be faithful to their duty," *Mezzanatto*, 513 U.S. at 210, any lower court presented with a *Brady* motion in such circumstances would grant no further relief than access to the "open file" that the prosecutor offers in purported satisfaction of his discovery obligations—as the reported cases attest.[16]

2. In fact, adoption of any "diligence" precondition to disclosure would be inconsistent with the development of *Brady* law, which has sought to simplify the rules governing administration of the government's disclosure obligations in a manner that minimizes excuses for nondisclosure while encouraging systemic compliance within and among prosecuting agencies. Like the plea, rejected in *Kyles*,

[16] *United States v. Upton*, 856 F. Supp. 727, 746 (E.D.N.Y. 1994) ("To the extent that the government represents that it 'has produced every document in its possession which relate in any way to this case' * * *, the court must assume the veracity of that representation. The alternative to such an assumption would require the court to examine numerous file drawers of documents to verify that representation which is as obviously undesirable as it is impractical"); *United States v. Firmin*, 589 F. Supp. 828, 829 (M.D. Pa. 1984) ("[T]he government contends that it has provided open file discovery. If any *Brady* materials are later determined to have been withheld by the prosecution, defendant may pursue appropriate remedies"); *Knox v. State*, 532 N.W.2d 149, 153 (Iowa App. 1995) ("The defense attorney and the trial court had a right to rely on the testimony of the State's attorney that all information about the print had been turned over to Knox").

that prosecutors be relieved of responsibility for disclosing evidence known only to the police, the introduction of a requirement that defendants satisfy a "reasonable diligence" standard as a precondition for exercising or enforcing the *Brady* rule "would * * * amount to a serious change of course from the *Brady* line of cases." *Kyles*, 514 U.S. at 438.

Moreover, a "diligence" requirement is unworkable in the context of a doctrine, like *Brady*, that depends in the first instance on prosecutorial judgments about the value of evidence. In many cases, a prosecutor's ability to determine whether or not a particular item of favorable evidence is available to defense counsel through the exercise of reasonable diligence will require information which the current system does not entitle the prosecutor to obtain, such as knowledge of what expert assistance an indigent defendant has been authorized to retain, or how witnesses have reacted to being approached by a defense investigator. Thus, without a corresponding requirement—unprecedented in American criminal procedure—that a defendant provide ongoing disclosure of how his defense is developing, the prosecutor would be utterly unable to gauge when his obligation to disclose favorable information has been triggered. Nothing in this Court's cases requires the injection of that additional complexity into *Brady* doctrine.[17]

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[17] Whether a criminal defendant has been "diligent" in *using* information that has actually been *disclosed* may be relevant to related doctrinal areas, particularly to an assessment of counsel's performance under *Strickland v. Washington*, 466 U.S. 668 (1984). That inquiry, however, has no independent role to play under *Brady*.

II. PETITIONER CLEARLY ESTABLISHED BOTH "CAUSE" FOR FAILING TO PRESENT HIS *BRADY* CLAIM TO THE STATE COURTS AND ACTUAL "PREJUDICE" FROM THE COMMONWEALTH'S VIOLATION OF *BRADY*

Petitioner never presented to the state courts his claim that the Commonwealth violated *Brady* by suppressing the Stoltzfus materials, and that claim is therefore procedurally barred.[18] Accordingly, under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny petitioner must demonstrate "cause" for his failure to raise the claim in the state courts "and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989). As the district court correctly concluded, petitioner has made that showing.

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[18] Although a habeas petitioner ordinarily must "exhaust" his state remedies by presenting his claims to the state courts in the first instance, *see* 28 U.S.C. 2254(b), exhaustion is not an issue in this case because that requirement "refers only to remedies still available at the time of the federal petition." *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (quoting *Engle v. Isaac*, 456 U.S. 107, 126, n.28 (1982)); *see also Castille v. Peoples*, 489 U.S. 346, 351 (1989). The court of appeals concluded that the Virginia courts would today refuse to entertain petitioner's *Brady* claim, and petitioner agrees with that conclusion. Petitioner does *not*, however, agree with the *reasons* for it cited by the court of appeals, *viz.*, that court's view that any application that petitioner might file today in the Virginia courts would be a "successive petition" based on grounds that were "available to him" when he first sought state habeas corpus. J.A. 414 (citing Va. Code Ann. § 8.01-654(B)(2)). Virginia courts would not hear the new *Brady* claim because, as a result of an intervening change in state law, any petition to the state courts would be found time-barred. *See* Va. Code Ann. § 8.01-654.1.

A. The Commonwealth's Repeated Nondisclosure And Repeated Misrepresentations That Its "Open File" Contained All *Brady* Material Constitutes "Cause" For Petitioner's Failure To Raise The *Brady* Claim In State Proceedings

1. This Court has defined "cause" as something "*external* to the petitioner, something that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753 (emphasis in original). Thus "the existence of cause * * * must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Ibid. (quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Amadeo v. Zant*, 486 U.S. 214, 222 (1988). That external factor may consist of "a showing that the factual or legal basis for a claim was not reasonably available to counsel," or a demonstration that " 'some interference by officials' * * * made compliance impracticable." *Coleman*, 501 U.S. at 753 (*quoting Carrier*, 477 U.S. at 488); *see also McCleskey v. Zant*, 499 U.S. 467, 497 (1991) ("external impediment, whether it be government interference *or* the reasonable unavailability of the factual basis for the claim") (emphasis added). As the Court noted in holding that the utter legal novelty of a claim constitutes "cause" for failing to raise it sooner, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the ["cause"] requirement is met. If counsel has no reasonable basis upon which to formulate a constitutional question * * * it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort." *Reed v. Ross*, 468 U.S. 1, 14-15 (1984).

This case fits squarely within both aspects of this "external" understanding of cause, because not only was the factual basis of the *Brady* claim unavailable to defense counsel, but the *reason* for the unavailability of the claim was the Commonwealth's misleading conduct. At trial,

the Commonwealth's attorney maintained that he had an "open file" policy with respect to materials properly discoverable by the defense, a point noted by the Supreme Court of Virginia in its opinion on direct appeal. *Strickler v. Commonwealth*, 404 S.E.2d at 233 (noting that petitioner received all the discovery to which he was entitled). In state habeas corpus proceedings, the Attorney General affirmatively represented to the court and petitioner's counsel that petitioner received all *Brady* material through the prosecutor's open file policy. J.A. 212-13. In fact, however, the Commonwealth never produced the plainly exculpatory Stoltzfus materials until faced with a federal subpoena in the federal habeas corpus proceedings. The actions of the Commonwealth in inviting reliance on the purported discharge of its constitutional discovery obligations through its "open file" policy amount to concealment pure and simple. And, as this Court noted in *Amadeo, supra*, "if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the [claim] * * * then petitioner established ample cause to excuse his procedural default under this Court's precedents." 486 U.S. at 222; *see also McCleskey*, 499 U.S. at 501 (finding that petitioner had not established "cause" because there was "no misrepresentation or wrongful conduct by the State in failing to hand over the document earlier").

2. The court of appeals faulted petitioner, however, for failing to seek discovery in the state habeas corpus proceedings, and thus failing to obtain the Stoltzfus materials earlier. The court believed that such discovery would have been sought by any "reasonably competent counsel." J.A. 421. The Stoltzfus materials, however, comprise precisely the sort of investigative reports and correspondence generally viewed as privileged, and thus nondiscoverable, under Virginia law. *See* Va. S. Ct. Rule 3A:11(b)(2) (exempting from discovery by criminal defendants any police reports and any "statements made by Commonwealth witnesses or prospective Commonwealth

witnesses").[19] And even if the Stoltzfus materials had not been protected by privilege, petitioner would have been unable to obtain discovery in state habeas, which is permitted only with "leave of court" (Va. S. Ct. Rule 4:1 (b)(5)) and upon "a showing of some special circumstances in addition to relevancy." *Rakes v. Fulcher*, 172 S.E.2d 751, 756 (Va. 1970) (noting that "[t]he mere suspicion that [a witness] ha[s] made inconsistent and incomplete statements is not a showing of good cause") *see also Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995). There is no reasonable likelihood that such a discovery motion in state habeas would have produced anything other than the Commonwealth's stock assurance that, by providing "open file" discovery, it had already fully complied with its obligations under the Constitution. Indeed, we *know* that any motion to the Virginia courts would have been unsuccessful because on *direct* review the Supreme Court of Virginia *treated petitioner's other claims as though he had in fact made such a discovery motion*, and expressly concluded that "petitioner had the benefit of all the discovery to which he was entitled under the Rules." *Strickler*, 404 S.E.2d at 233.[20]

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[19] *See also* Va. Code Ann. § 2.1-342(b)(1) (exempting from state FOIA disclosure "[m]emoranda, correspondence, evidence and complaints related to criminal investigations; * * *; reports submitted to the state and local police * * * in confidence"); *Rosser v. Commonwealth*, 482 S.E.2d 83, 87 (Va. App. 1997) (in light of Rule 3A:11(b)(2), trial court correctly "instructed appellant that the requested records could not be obtained with a subpoena duces tecum").

[20] The Supreme Court of Virginia's express avowal that petitioner in fact had the benefit of *all* discovery that might be available to an accused under its Rules is significant for one additional reason. It demonstrates that the Supreme Court of Virginia accords to the filing of a formal discovery motion far less significance than does the Fourth Circuit. It would indeed be anomalous to permit the Fourth Circuit to enforce Virginia's discovery rules more strictly than Virginia itself does.

Moreover, the comity and federalism policies that underlie this Court's procedural default jurisprudence would be decidedly ill-served by a rule requiring criminal defendants to deluge state courts with speculative discovery motions, solely to preserve their federal rights for later review in the presumably rare cases in which state prosecutors turn out not to have been "faithful to their duty." *Mezzanatto*, 513 U.S. at 210. As the Court observed in *Reed*, that is precisely the sort of rule that "might actually disrupt state-court proceedings by encouraging defense counsel to [present to the state courts] any and all remotely plausible * * * claims that could, some day, gain recognition." *Reed*, 468 U.S. at 15-16. Here as elsewhere, it makes far more sense to craft background procedural rules on the assumption that public officers " 'have properly discharged their official duties.' " *Mezzanatto*, 513 U.S. at 210 (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Indeed, the appropriateness of that approach necessarily is at its acme where, as here, this Court already made the judgment of entrusting enforcement of the underlying norm (*Brady*) to prosecutors rather than courts in the first instance.

3. In any event, it is well settled that a habeas petitioner establishes "cause" by showing, under *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel were ineffective. Petitioner submits that the court of appeals' treatment of that issue cannot withstand scrutiny. If, as the court of appeals believed, any reasonably competent defense counsel would have sought *Brady* materials from the state courts by motion, then petitioner's trial counsel assuredly were constitutionally ineffective in failing to make such a motion. That professional failure clearly prejudiced petitioner by depriving him of key exculpatory evidence and plainly establishes "cause," as the district court alternatively found. J.A. 276. Yet the court of appeals rejected that alternative finding of "cause" on the stated ground that, *in light of the open file policy*, "trial counsel were under no obligation to file a *Brady*

motion." *Id.* at 424. Indeed, the court cited approvingly to *Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir. 1983), for the proposition that " '[c]ounsel had no duty to file pre-trial motions, because the prosecutor established an open file policy that made filing of discovery motions or *Brady* requests pointless.' " J.A. 424. The Fourth Circuit did not explain, nor is it apparent, how that line of analysis can possibly be squared with its ruling that petitioner's constitutional claims were irretrievably lost *precisely* because he failed to file such a "pointless" motion.

B. Petitioner Was Clearly Prejudiced By The Commonwealth's Nondisclosure Of *Brady* Materials

The record in this case also leaves no doubt that petitioner has established "actual prejudice as a result of the * * * violation of federal law." *Coleman*, 501 U.S. at 750. While this Court has never given the prejudice standard "precise content," *United States v. Frady*, 456 U.S. 152, 168 (1982), it has required a showing that the constitutional error "worked to [the petitioner's] *actual* and substantial disadvantage." *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (*quoting Frady*, 456 U.S. at 170) (emphasis in original). Such a showing is inherent in the nature of the violation where, as here, the underlying norm (*Brady*) already requires a showing of materiality, defined as " 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles*, 514 U.S. at 433-34 (*quoting Bagley*, 473 U.S. at 682). Indeed, this Court's cases have repeatedly cited to *Bagley* (and to *Strickland*'s standard of prejudice, from which the *Bagley* standard was derived) as reflecting what showing is sufficient to establish "prejudice" for any alleged procedural bar. *See Schlup v. Delo*, 513 U.S. 298, 327 & n.45 (1995) (recognizing that proof of materiality under *Bagley* is sufficient "to establish prejudice" excusing a procedural default); *id.* at 333 (O'Connor, J., concurring) (same);

see also Sawyer v. Whitley, 505 U.S. 333, 345 (1992) (equating "prejudice" with *Bagley* materiality standard).

Indeed, as the Court noted in *Kyles*, a determination of materiality "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the verdict.' " *Kyles*, 514 U.S. at 435 (citations omitted). Where, as here, that "substantial and injurious effect" produced a manifestly unreliable capital verdict and death sentence, it assuredly worked to petitioner's "*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. at 170 (emphasis in original).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 1998

APPENDICES

In the following chart, pertinent facts are listed along the left-hand column. For example, was Stoltzfus at the mall at all? Did Stoltzfus see Ms. Whitlock "singing"? Did she feel a hard object under a coat? Did she know the license tag number? The boxes across the top designate the sequence of statements made by Stoltzfus. The chart illustrates whether Stoltzfus included certain "facts" in her series of statements.

	1/19 Notes	Observations 1/19	1/22 letter	Viewed car (1/24)	Met with boyfriend (1/25)	1/26 letter	"Details"
At Mall?			admits she did not remember earlier	Yes		Yes	Yes
Can I/D B/F?	No[1]	No	No		Yes	Yes	Yes
Singing?	No	No	No			No	Yes
Can I/D 1st W/M?	Maybe	No	No			"should be able"	No
ID car?	No	No	No	"looked like" it	No	Yes	Yes
License #	No	No	No	No	No	Yes	Yes
Encounter in Musicland	No	No	No			Yes	Yes
Saw in Mall?	Maybe	No	Yes			Yes	Yes
Weapon in coat?	No	No	No			No[2]	Yes

1 "No" entry on this chart indicates that in the document under which the entry appears Stoltzfus either omitted the factual question listed in the left column or the document contains a negative answer to the question.

Got out of car?[3]	No	No	No			No	Yes
Confused or bad memory?			confused[4]			Yes[5]	No
Need help making associations?			Yes[6]			Yes[7]	No

[Footnote continued from previous page]

2 Stoltzfus' tactile description of the coat omits the "fact" that she felt a hard object under it: "My entire left arm brushed a long tan light-weight coat of synthetic fabric that was draped over his right arm."

3 This refers to the "fact" that Stoltzfus got out of her car, in traffic, to approach the girl's car to see if she was all right.

4 "Were these two memories of the same person?"; "I want to clarify some of my confusion for you."

5 Stoltzfus thanked Claytor for his "patience with my sometimes muddled memory." She also stated that "I know that if I believed at the time that I was witnessing a crime I would have much, much more vivid memories."

6 Daughter "remembers different things and her sharing with me what she remembers helped jog my memory."

7 Stoltzfus told Claytor "I never would have made any of the associations that you helped me make."

APPENDIX B

The Rules of the Supreme Court of Virginia provide, in pertinent part:

Rule 4:1. General Provisions Governing Discovery.

(a) *Discovery Methods.*—Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Scope of Discovery.*—Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subject to the provisions of Rule 4:8(g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is

unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).

* * * *

(5) Limitations on Discovery in Certain Proceedings. In any proceeding (1) for separate maintenance, divorce, or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

Rule 3A:11. Discovery and Inspection.

(a) *Application of Rule.*—This Rule applies only to prosecution for a felony in a circuit court.

(b) *Discovery by the Accused.*—(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for

the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

The Virginia Code Annotated provides, in pertinent part:

§ 2.1-342. Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter.— A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens * * *.

* * * *

B. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of such photograph will no longer jeopardize the investigation; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; records of local police departments relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such departments under a promise of confidentiality; and all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of this chapter.

Criminal incident information relating to felony offenses shall not be excluded from the provisions of this chapter; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

* * * *

§ 15.2-1722. Certain records to be kept by sheriffs and chiefs of police.—A. It shall be the duty of the sheriff or chief of police of every locality to insure, in addition

to other records required by law, the maintenance of adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency. Failure of a sheriff or a chief of police to maintain such records or failure to relinquish such records to his successor in office shall constitute a misdemeanor. Former sheriffs or chiefs of police shall be allowed access to such files for preparation of a defense in any suit or action arising from the performance of their official duties as sheriff or chief of police. The enforcement of this section shall be the duty of the attorney for the Commonwealth of the county or city wherein the violation occurs. Except for information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, the records required to be maintained by this section shall be exempt from the provisions of Chapter 21 (§ 2.1-340 et seq.) of Title 2.1.

B. For purposes of this section, the following definitions shall apply:

"Arrest records" mean a compilation of information, centrally maintained in law-enforcement custody, of any arrest or temporary detention of an individual, including the identity of the person arrested or detained, the nature of the arrest or detention, and the charge, if any.

"Investigative records" means the reports of any systematic inquiries or examinations into criminal or suspected criminal acts which have been committed, are being committed, or are about to be committed.

"Noncriminal incidents records" means compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths.

"Personnel records" means those records maintained on each and every individual employed by a law-enforcement agency which reflect personal data concerning the em-

ployee's age, length of service, amount of training, education, compensation level, and other pertinent personal information.

"Reportable incidents records" means a compilation of complaints received by a law-enforcement agency and action taken by the agency in response thereto. (1975, c. 290, § 15.1-135.1; 1979, c. 686; 1981, c. 284; 1997, c. 587.)

§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

§ 19.2-264.2. Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

§ 8.01-654.1. Limitation on consideration of petition filed by prisoner sentenced to death.—No petition for a writ of habeas corpus filed by a prisoner held under a

sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or (iii) the expiration of the period for filing a timely petition for certiorari without a petition being filed.

However, notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him. (1995, c. 503; 1998, c. 199.)

§ 8.01-654. When and by whom writ granted; what petition to contain.—A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the

circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124.)

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

No. 98-5864

In The

Supreme Court of the United States

October Term, 1998

TOMMY DAVID STRICKLER,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Given that he failed to raise his so-called *"Brady"* claim in state collateral proceedings and that the claim would be barred if raised in state court now, may petitioner establish "cause" to excuse his default when he clearly could have pursued and raised the claim in his state collateral proceedings just as he subsequently did in his federal habeas proceeding?

II. Even if petitioner could show "cause" for his default, is a finding of the required "prejudice" precluded by his trial attorney's actual knowledge of the substance of the allegedly undisclosed impeachment material, by Strickler's admissions to the jury, a probation officer and the trial judge, and by the Court of Appeals' reasonable conclusion that the undisclosed material, if disclosed, would not have made a difference in the outcome of petitioner's trial?

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STATEMENT OF THE CASE

Nine years ago, Tommy Strickler murdered Leanne Whitlock, a 19-year-old black college student, after abducting her from the Valley Shopping Mall in Harrisonburg, Virginia, and after robbing her while armed with a deadly weapon. Strickler and his accomplice, Ronald Henderson, killed Whitlock by dropping a 69-pound rock on her head four times, crushing her skull so forcefully that bone fragments were embedded in her brain. Whitlock's frozen, nude body was found hidden in an Augusta County field eight days after her abduction.

A. Strickler's guilt was established overwhelmingly by the evidence independent of the testimony of Anne Stoltzfus:

The uncontested evidence at trial showed that at about 4:30 p.m. on January 5, 1990, Whitlock borrowed John Dean's 1986 blue Mercury Lynx automobile which bore West Virginia tags "NKA 243." At the time Whitlock borrowed the car, it was clean and Whitlock agreed to return it to Dean "an hour or two later" at the Valley Mall where Dean worked at the Footlocker Store. (JA 18). After borrowing the car, Whitlock, accompanied by her roommate, ran errands culminating in a take-out cheeseburger and french fry dinner at about 6:00 p.m. The roommates returned home to eat, and at approximately 6:30 to 6:45 p.m. Whitlock left her apartment to return the borrowed car to Dean at the mall. (JA 22-23). She was wearing a pair of pearl earrings that belonged to her mother. After leaving the apartment that evening, neither her roommates nor Dean ever saw Whitlock alive again and Whitlock did not return Dean's car as scheduled. (JA 18, 23, 25).

Strickler's mother, Irene Silvious, testified that on January 5 she left her home in New Market, Virginia, to

go into Harrisonburg to do her banking. She was accompanied by Strickler and his friend, Ronald Henderson. (JA 149). Strickler and Henderson, however, disappeared when she parked her car at the bank and she did not see them again that day. According to Silvious, Strickler "always" carried with him a hunting knife which had been given to him by his father. (JA 149).

Strickler and Henderson subsequently were seen at the Valley Mall by Virginia Smith, a mall security guard, and by Donna Warner, a friend of Henderson's who was shopping at the mall. (JA 27-28, 32). Smith testified that at approximately 3:30 p.m. on January 5 she received a report that two white males, later identified as Strickler and Henderson, were attempting to steal a white Continental from the mall parking lot. By the time Smith reached the location of the white Continental, however, Strickler and Henderson had fled. After searching throughout the mall, Smith located Strickler and Henderson and she spent the remainder of the afternoon watching them. At about 6:45 p.m., however, the pair apparently noticed Smith watching them and they "took off out of the food court" toward the main entrance of the mall. Smith subsequently lost sight of the pair and she did not see them again that evening. (JA 28-33).

Kurt Massie testified that at about 7:30 p.m. on January 5 he was traveling on Route 340 in Augusta County when he saw Strickler driving a dirty blue car. Massie saw three people in the vehicle, although he acknowledged that there may have been a fourth occupant in the car. His attention was drawn to the car because it was turning onto a dirt road which led into a field and this was an area where Massie knew vehicles often became stuck. Massie stopped and watched Strickler because he thought that he would have to help Strickler dislodge his car once it got stuck. The car, however, had no apparent

difficulty negotiating the dirt road and Massie continued on his way. (JA 64-69).

Later that same evening, Carolyn Brown, Debbie Sievers and Nancy Simmons were at Dice's Inn, a bar in Staunton, Virginia.[1] (JA 73, 78, 80). Also at Dice's was Donna Kay Tudor. At approximately 9:00 p.m., Strickler and Henderson entered Dice's.[2] Brown, Sievers and Tudor testified that when Strickler arrived at Dice's his jeans were dirty and Tudor saw blood on them.[3] (JA 75, 79, 81, 95). While at Dice's, Strickler spent most of his time with Tudor; Henderson spent his evening with Simmons. Simmons testified that at some point during the evening Henderson gave her Whitlock's watch as a gift. (JA 82). According to Sievers, Strickler and Henderson left Dice's around 2:00 a.m. with Tudor in a vehicle Sievers identified as Dean's blue Lynx. (JA 77).

Tudor testified that she met Strickler and Henderson at Dice's and, after spending the evening with Strickler, left with the two men to search for marijuana. As they drove around, she sat in the back seat of the car while Henderson and Strickler sat in the front seat. During the drive, Strickler became angry at Henderson for driving erratically, pulled a knife and threatened to stab Henderson. Tudor also overheard a conversation between the

---

[1] Staunton is surrounded by Augusta County and is approximately 25 miles from Harrisonburg.

[2] The evidence established that Tudor already was at Dice's before Strickler and Henderson arrived. Sievers, Brown and Simmons all testified that Tudor was at Dice's by 8:00 p.m. – over an hour before Strickler and Henderson arrived. (JA 76, 81). Tudor testified that she was dropped off at Dice's around 8:00 p.m. and that she encountered Strickler after she arrived. (JA 89).

[3] The blood later was determined to be type "O" – common to both Whitlock and Strickler.

men in which they were discussing a "fight" which had occurred earlier that evening. Specifically, they talked about getting into a fight with "it" and they referred to "it" as a "nigger." They additionally talked about how they had kicked "it" in the side of the head and Tudor heard Strickler state that he had used a "rock crusher" on "it" so that "it" would "give him no more trouble." (JA 91-93, 96).

Sometime after this conversation, Strickler and Tudor dropped Henderson off, and Strickler and Tudor drove to Virginia Beach in the stolen blue Lynx. On the trip to Virginia Beach, Strickler gave Tudor the pearl earrings Whitlock had been wearing when she disappeared on January 5. (JA 96). Also during this trip, Tudor noticed Whitlock's driver's license, I.D. and bank card in the car, and Tudor testified that Strickler attempted unsuccessfully to use the bank card in Virginia Beach. (JA 96). In what the Virginia Supreme Court later described as a "transparent falsehood," Strickler told Tudor he had bought the car from "some man . . . for five hundred [dollars]." (JA 96).

Strickler and Tudor returned to the Augusta County area on January 10 or 11, 1990. Once back in the area, the blue Lynx broke down. Strickler pushed the car out of the road and abandoned it. (JA 97). Strickler and Tudor proceeded to his mother's house in New Market, where Strickler washed his bloody jeans and directed Tudor to dispose of a brown paper bag containing Whitlock's identification. (JA 95, 147). The car was recovered by the police and was positively identified as John Dean's car that he had lent to Whitlock on the afternoon of January 5. Strickler's fingerprints and footprints were found on both the inside and outside of the vehicle. (JA 99, 128-129).

On January 13, 1990, Daniel Holsinger was farming in the field off Route 340 into which Kurt Massie had seen Strickler driving the blue Lynx on the night of January 5. As Holsinger and his sons harvested corn, one of the boys discovered a wallet belonging to Ronald Henderson. After seeing Henderson's picture on the television news, Holsinger contacted the police. (JA 85-88). When the police searched the field where the wallet had been found, they discovered Whitlock's frozen, battered body hidden behind a mound of logs, twigs and dirt. Near the nude body was a 69-pound rock spotted with human blood. (Trial Tr. 6-18-90 at 587-588).

A forensic pathologist determined that Whitlock's death was due to "multiple blunt force injuries to the head with depressed skull fractures and lacerations of the brain" (JA 109), consistent with having been inflicted by the blood-stained rock found near her body. The pathologist testified that, based upon the undigested hamburger, cheese, pickle and french fry material found in Whitlock's stomach, "death occurred, at an absolute maximum, six hours after she ate and probably much less than that," perhaps as little as an hour or two. (JA 112).

Finally, the Commonwealth presented evidence that Caucasian head hairs found on Whitlock's shirt and bra were "microscopically alike in all identifiable characteristics" to Strickler's and had been "forcefully removed" from the donor's head. (JA 136). Semen consistent with Strickler's was found on the shirt Strickler was wearing on January 5 and vaginal swabs taken from Whitlock's body also showed the presence of semen, although its type could not be identified.

B. Anne Stoltzfus' testimony:

Anne Stoltzfus testified that she had been shopping at the Valley Mall with her 14-year-old daughter on January 5, 1990 when she encountered Strickler, Henderson and a "blonde woman" at a music store at approximately 6:00 p.m. Her attention was drawn to Strickler because he appeared "revved up." (JA 36). Stoltzfus admitted that her memory of how the trio was dressed was "a little vague." (JA 37). According to Stoltzfus, Strickler was dressed in bedraggled but "clean" jeans and was wearing a gray T-shirt with a Harley-Davidson emblem across the front. He wore a flannel shirt over the T-shirt and an embroidered denim jacket over the flannel shirt. Stoltzfus described the blonde girl as wearing "denim jeans, a white top that had buttons down the front and white sneakers." Finally, Stoltzfus testified that Henderson was wearing a light-colored shirt and neat pants. (JA 37).

The employees in the music store could not help Stoltzfus locate the particular compact disc she was looking for and she was told to return to the store at 6:45 p.m. when another clerk would be returning from his break. As she was returning to the store at about 6:45 p.m., Stoltzfus again encountered Strickler, Henderson and the blonde woman. Strickler was yelling for "Donna" and Stoltzfus asked the blonde woman if she was "Donna." According to Stoltzfus, the woman replied: "Donna" or "Sharon." Strickler then asked the blonde woman, "Where is Ronnie?" and directed her and Henderson to meet him at the bus stop. Upon the blonde woman's inquiry, Stoltzfus directed her to the bus stop at the front of the mall. (JA 38-39).

Shortly thereafter, Stoltzfus left the music store and, as she was driving through the mall parking lot, she noticed a "shiny dark blue car" driven by a black woman, whom she identified as Leanne Whitlock. Whitlock, as

well as Stoltzfus, were forced to stop for traffic. While they were stopped, Strickler approached both a mini-van that had just unloaded passengers and a white pickup truck stopped ahead of Whitlock's car and "pounded" on both vehicles. Strickler then came back and pounded on Whitlock's passenger window, opened Whitlock's car door and "jumped in" on the passenger side. He motioned for Henderson and the blonde girl to get in the car but Whitlock apparently stepped on the gas pedal causing the car to jerk forward, and they initially were unable to enter the vehicle. Whitlock then sounded her car horn but stopped when Strickler began hitting her. Henderson and the blonde girl then were able to get in the car. (JA 43-44).

Stoltzfus sounded her car horn and when Whitlock's vehicle did not move, she "pulled up parallel" with Whitlock and got out of her car. Stoltzfus tried to ask Whitlock three times if she was "O.K." Whitlock did not respond except to make "direct eye contact and then look down to her right." Whitlock also mouthed a word which Stoltzfus later thought might have been "help." (JA 45-47). At this point Whitlock's car went up over the curb and Whitlock "laid on the horn again." Stoltzfus recorded the blue car's license plate number, NKA 243, on a 3x5 card and remembered it with a trick: "No Kids Alone – 243." (JA 48). Stoltzfus saw the blue car leave the mall and head east on Route 33.

On cross-examination, Stoltzfus admitted that she never reported to the police what she had witnessed at the mall on January 5, 1990. Rather, the police approached her after she had mentioned to a classmate[4] what she had observed at the mall and the classmate

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[4] Stoltzfus, like Whitlock, was a student at James Madison University in Harrisonburg.

phoned the police. Also on cross-examination, Stoltzfus admitted that she had met with Detective Dan Claytor of the Harrisonburg Police Department a number of times prior to trial. During these meetings, she had viewed three photo line-ups and she testified that her identification of Strickler from the photos was "absolute." (JA 50-56). Finally, Stoltzfus admitted that shortly before trial she had spoken to a reporter from the Roanoke Times and World News about what she had witnessed on January 5, 1990. (JA 53).

C. Trial and direct appeal:

Prior to his trial in the Augusta County Circuit Court, Strickler did not file a motion under *Brady v. Maryland*, 373 U.S. 83 (1963), asking for exculpatory evidence in possession of the Commonwealth. Instead, Strickler took advantage of the prosecutor's open file policy and, pursuant to this policy, examined the Augusta County prosecutor's files "numerous" times. (JA 223).

At trial in June of 1990, Strickler conceded to the jury in the guilt-stage closing argument that he was guilty of abduction, robbery and first-degree murder. (JA 185, 192-193). He argued, however, that he should not be found guilty of capital murder because the Commonwealth had failed to prove that he rather than Henderson actually had dropped the rock on Whitlock's head. (JA 193). The jury rejected Strickler's argument, convicted him of capital murder and, after a separate hearing on the issue of punishment, recommended that he be sentenced to death based upon findings of both "vileness" and "future dangerousness." *See* Va. Code § 19.2-264.4. The trial judge ordered a pre-sentence report as required by Virginia Code § 19.2-264.5.

Shortly after the conclusion of the jury trial, Stoltzfus wrote a letter to the editor of the Harrisonburg Daily

News Record. The letter was published in the newspaper on July 18, 1990. In the letter, she stated that her "coherent story at trial was the result of an incredible effort by police to put a zillion little puzzle pieces into one big picture." (JA 250).

At the final sentencing hearing on September 19, 1990, the defense acknowledged that it had reviewed the pre-sentence report. Among other things, the report contained a section captioned "Subject's Version," in which Strickler admitted that he, along with Henderson, had been at the Valley Mall on January 5, that he had entered the blue Lynx at the mall and that he was present in the field at the time Whitlock was murdered. (Augusta County Circuit Court Trial Record; report filed 9-19-90).

During his allocution at the sentencing hearing, moreover, Strickler confirmed the information in the pre-sentence report:

> It's true, true I was at the mall with this individual. It is true that I was at [the murder] sight [sic] but I was told that he [Henderson] was walking her home. I sat in the car and waited . . .
>
> * * *
>
> It was only three of us (inaudible), Henderson was behind the driver's wheel, Ms. Whitlock was sitting in the back seat, I got in on the passenger side. . . .

(Trial Tr. 9-19-90 at 54-55). Strickler also admitted, just as Stoltzfus testified, that prior to entering Whitlock's vehicle he had approached a van unloading passengers at the front of the mall:

> I walked across the parking lot to a van and then come [sic] back where she indicated I was, they was [sic] stopped. At no time at the Valley Mall does traffic stop. It pulls up to the stop, to

> the sidewalk, unloads passengers but meanwhile traffic continues through (inaudible). At no time does traffic stop in mainstream.

(*Id.* at 56). After Strickler's allocution, the trial judge imposed sentence in accordance with the jury's verdicts.

On direct appeal in the Supreme Court of Virginia, Strickler raised no claim that the Commonwealth had withheld exculpatory evidence. The Virginia Supreme Court affirmed Strickler's conviction and death sentence. *Strickler v. Commonwealth*, 404 S.E.2d 277 (Va. 1991). This Court denied certiorari on November 4, 1991. *Strickler v. Virginia*, 502 U.S. 944 (1991).

D. State habeas corpus:

In December, 1991, the Augusta County Circuit Court appointed two attorneys to represent Strickler in state habeas corpus proceedings. (JA 203). Nine months later, on September 1, 1992, Strickler filed a 51-page habeas petition, which raised over 100 claims but contained no allegation that the Commonwealth had withheld exculpatory evidence at trial.

The Warden filed a motion to dismiss on November 12, 1992. In response to an allegation that trial counsel were ineffective for failing to file a *Brady* motion, the Warden asserted that, because "counsel were voluntarily given full disclosure of everything known to the government[,] there was no need for [trial counsel to file] a formal motion." (JA 212). In addition, the Warden asserted that Strickler could not establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) because, by virtue of the prosecutor's "open file" discovery, "counsel in fact obtained all the information to which they were entitled under *Brady*." (JA 213).

After the motion to dismiss was filed, the case sat dormant for over seven months until the Warden moved

for entry of an order dismissing the petition. Only then did Strickler seek the appointment of experts and an investigator. (JA 234). At no time, however, did Strickler seek discovery pursuant to Virginia Supreme Court Rule 4:1(b)(5), which allows discovery in habeas cases "with prior leave of the court." On September 10, 1993, the habeas court dismissed Strickler's petition. (JA 247).

Strickler's subsequent petition for appeal to the Virginia Supreme Court was granted, limited to his Assignment of Error No. 9 and a related ineffective counsel claim.[5] After full briefing and oral argument, the Virginia Supreme Court ruled that the substantive claim regarding the propriety of a jury instruction was barred under *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), *cert. denied*, 419 U.S. 1108 (1975), because it had not been raised at trial and on direct appeal. Strickler's ineffective counsel claim was rejected because, in light of the overwhelming evidence that Strickler murdered Whitlock during the commission of a robbery while armed with a deadly weapon – the 69-pound rock – Strickler failed to demonstrate that he had been prejudiced by counsel's alleged error. *Strickler v. Murray*, 452 S.E.2d 648 (Va. 1995). This Court denied Strickler's petition for a writ of certiorari on October 2, 1995. *Strickler v. Angelone*, 516 U.S. 850 (1995).

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[5] Assignment of Error 9 read:

> The [state habeas judge] erred in not vacating the capital murder conviction despite its finding that Instruction 1 given at petitioner's trial was defective because of its inclusion in the definition of capital murder an underlying offense which does not by statute support a conviction of capital murder.

E. Federal habeas corpus:

In the United States District Court for the Eastern District of Virginia, Strickler sought and was granted ex parte, pre-petition discovery, whereby he obtained eight documents from the files of the Harrisonburg Police Department pertaining to Anne Stoltzfus. Strickler then filed a lengthy federal habeas petition which for the first time raised a "*Brady*" claim based upon the alleged non-disclosure of the so-called "Stoltzfus materials."

During subsequent discovery conducted by Strickler in the district court, the prosecutor stated unequivocally under oath that exhibits 2, 7 and 8 of the "Stoltzfus materials" were in the "open file" which the defense inspected prior to trial. (JA 368). The prosecutor, however, never had seen exhibits 1, 3, 4, 5 and 6 until after Strickler proffered them in support of his federal habeas petition. (JA 366-367).

All of Strickler's claims, except the exculpatory evidence claim and various allegations of ineffective assistance of counsel, were dismissed by the district court. (JA 283). Although the court acknowledged that Strickler's exculpatory evidence claim was defaulted because it never had been raised in state court, it ruled without elaboration that Strickler had established "cause" for his default because "the Commonwealth repeatedly withheld [the *Brady* material] throughout the petitioner's state habeas proceedings." (JA 287).

The district court ordered an evidentiary hearing, but both parties filed motions for summary judgment, accompanied by supporting documents. In support of his cross-motion for partial summary judgment, the Warden filed an affidavit from one of Strickler's trial counsel, Thomas Roberts. In the affidavit, Roberts stated that the trial defense team was aware at the time of trial of the information contained in the "Stoltzfus materials" and of the

fact that Stoltzfus' recollection of the abduction at the mall allegedly had evolved over time. (JA 371). The Warden also proffered a copy of a Roanoke newspaper article dated June 17, 1990, about which Stoltzfus had been cross-examined at trial. (JA 372). As the district court was forced to acknowledge, the article "contained details [about Stoltzfus' observations] that might have been helpful if Strickler did not already know them." (JA 400).

On October 2, 1997, Strickler withdrew, with prejudice, his ineffective counsel claims and asked the district court to decide the exculpatory evidence claim on the cross-motions for summary judgment. The district court canceled the evidentiary hearing and on October 16, 1997, granted Strickler's motion for summary judgment. Although for purposes of the summary judgment motions the district court specifically credited Roberts' affidavit, it denied the Warden's cross-motion for summary judgment. (JA 399). In its final order granting the writ, the district court concluded that exhibits 1, 3, 4, 5 and 6 of the "Stoltzfus materials" were "material" under *Brady* because "without Stoltzfus' testimony, the jury could have found Henderson as the leader and instigator [of Whitlock's abduction] instead of Strickler." (JA 394). The district court also reached the implausible conclusion that "exhibit 4 provide[d] a basis for which Stoltzfus' testimony might have been excluded altogether." (JA 389). The district court did not mention exhibits 2, 7 or 8, but did not take issue with the prosecutor's sworn, unequivocal representation that the defense had access to each of those documents prior to trial.

The Fourth Circuit unanimously reversed, concluding that, because Strickler's *Brady* claim was available to him in state court through the exercise of reasonable diligence, there was no "cause" for his undisputed default. Noting the Virginia rule of court which allows

discovery in a state habeas proceeding with prior leave of court, the Fourth Circuit concluded that "Strickler could have followed a procedure similar to the one he followed in federal court" and discovered the "Stoltzfus materials" during state collateral proceedings. (JA 421). The Court of Appeals also concluded that the Stoltzfus documents were not "material" in light of Strickler's express concession at trial that he was guilty of abduction and robbery, and in light of the "overwhelming evidence in the record," independent of Stoltzfus' testimony, that "Strickler abducted and robbed Whitlock." (JA 425). The Fourth Circuit also specifically found that "the Stoltzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial," that "Strickler never contested that he abducted and robbed Whitlock," and that "Stoltzfus' testimony was not critical to the Commonwealth's case." (JA 425).

SUMMARY OF THE ARGUMENT

It should be an extremely rare event for a federal habeas court to reach the merits of a constitutional claim that never was raised in state court. Here, it is undisputed that Strickler never raised his so-called *"Brady"* claim in state court and that, having failed to raise the claim in his 1992 state habeas petition, Strickler would be barred under Virginia law from raising the claim in state court now.

Strickler admits that he must show "cause" to excuse his default, but his efforts to explain why he could not have raised his claim ***at trial*** miss the mark. The issue here is whether Strickler can show sufficient "cause" to excuse his failure to raise his claim ***during the state collateral proceedings***. He cannot rely on the errors or omissions of his state habeas counsel because he had no

constitutional right to counsel on state habeas. *See Coleman v. Thompson*, 501 U.S. 722 (1991). Therefore, the only way in which he can show "cause" for his state habeas default is to demonstrate some form of state action – something "external" to him and his lawyers – that prevented him from raising the claim in his state habeas petition. *See McCleskey v. Zant*, 499 U.S. 467 (1991). This he cannot do.

Petitioner's *"Brady"* claim concerns eight police documents – three of which he clearly had access to when his trial lawyers reviewed the prosecutor's "open file" – all relating to pretrial statements made by a prosecution witness, Anne Stoltzfus, who was not present when Strickler and his accomplice robbed and murdered their victim in a remote cornfield, but who was present earlier when they abducted her from a shopping mall. The record is replete with information that would have provided a basis for investigating a *Brady* claim in the state habeas court – not the least of which is the fact that one of Strickler's trial attorneys has stated under oath that at the time of trial he was aware of the substance of the information contained in Stoltzfus' pretrial statements to the police. The undeniable fact, moreover, is that there was nothing to prevent Strickler from pursuing his claim during the state collateral proceedings, just as he later pursued it in the federal habeas proceedings in the district court. The Fourth Circuit correctly concluded that Strickler's failure to ask the state habeas court for discovery of the police files is fatal to his effort to establish "cause" for his default.

Even if Strickler's failure to show "cause" could be overlooked, however, under no circumstances should this Court condone his effort to pervert the truth-enhancing *Brady* rule into a license for state prisoners to play fast and loose with the truth. In arguing the "materiality" of

the police documents that were not disclosed to the defense at the time of trial, Strickler would have this Court believe that, if only he could have impeached Stoltzfus' testimony, there would have been no reliable evidence that he was even at the mall when the victim was abducted or that he had any connection with the victim's automobile or other possessions until some point after the murder occurred. Such assertions, however, not only are contradicted by his trial attorney's concession to the jury that Strickler clearly was guilty of abduction, robbery and first-degree murder, but also are belied by Strickler's express admissions to the trial judge and to the probation officer who prepared a pre-sentence report that he was one of the two men whom Stoltzfus had seen entering the victim's car at the mall and that he was present at the crime scene when the victim subsequently was robbed and murdered.

When the record is viewed in its entirety, including all the evidence of Strickler's guilt that could be introduced at any retrial of his case, it is clear that the Fourth Circuit's decision was correct. Given the overwhelming evidence that Strickler and his accomplice murdered the victim during the commission of an armed robbery and, given the fact that Stoltzfus' trial testimony related only to the abduction at the mall and not to the robbery and murder that occurred at a different time and place, there is no reasonable probability that the outcome of Strickler's trial would have been any different if the five undisclosed police documents had been provided to the defense at the time of trial.

ARGUMENT

I. STRICKLER'S SO-CALLED *BRADY* CLAIM IS DEFAULTED AND THERE IS NO "CAUSE" FOR THE DEFAULT.

A. The Default

It is undisputed that Strickler's *Brady* claim never was raised at trial, on direct appeal or in state habeas corpus. If Strickler were to reapply for habeas corpus review in the Virginia Supreme Court, his claim would be barred, not only by Virginia Code § 8.01-654(B)(2), which prohibits successive petitions, but also by Virginia Code § 8.01-654.1, which requires that habeas corpus petitions in capital cases be filed within 60 days after denial by this Court of a petition for a writ of certiorari on direct appeal. Indeed, Strickler expressly admits on brief that he never raised his claim in state court, that he cannot raise the claim in state court now, and that the claim "is therefore procedurally barred." (Pet. Br. at 41).

It is black letter law that if a claim never was raised in state court and would be barred in state court if raised there now, federal habeas corpus relief is precluded as well. *See Teague v. Lane*, 489 U.S. 288, 298-299 (1989). In *Gray v. Netherland*, 518 U.S. 152 (1996), this Court declined to review the merits of a purported *Brady* claim because the claim never had been presented to the Virginia courts and Virginia Code § 8.01-654(B)(2) "preclude[d] review of the claim in any future state habeas proceeding." *Id.* at 162. Strickler's so-called *Brady* claim is identically defaulted and, absent a demonstration by Strickler of both cause and prejudice, this Court cannot consider it.[6]

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[6] Strickler devotes an inordinate amount of his brief to the argument that he has "cause" sufficient to excuse a purported default of his *Brady* claim at trial. To be clear, the Warden never

B. Cause

In *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977), this Court rejected the proposition that a state prisoner could not default a constitutional claim for purposes of federal habeas review unless he were guilty of a "deliberate bypass" of state court remedies. Instead, the Court fashioned a "cause and prejudice" test which requires the prisoner to explain satisfactorily why his claim had not been presented properly to the state courts. *Id.* at 87-91. Subsequent refinements by this Court, however, restricted "cause" to forms of state action, external to the defense, that prevented the prisoner from raising the claim in the state courts, *see Murray v. Carrier*, 477 U.S. 478, 488 (1986), and placed the burden on the prisoner to conduct a "reasonable and diligent investigation" in pursuit of the claim and to present it in a procedurally proper manner. *McCleskey*, 499 U.S. at 498. And, when a default occurs during state collateral proceedings, the prisoner cannot establish "cause" by pointing to the errors or omissions of his state habeas counsel because there is no constitutional right to counsel in such proceedings. *See Coleman*, 501 U.S. at 752. Under firmly established precedent, then, a state prisoner like Strickler cannot show "cause" for his admitted failure to bring a claim during state collateral proceedings if the defaulted claim was available to him in state court through a "reasonable and diligent investigation." *McCleskey*, 499 U.S. at 498.[7]

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has contended that Strickler's *Brady* claim is defaulted because it was not raised at trial. The Warden's contention always has been that the claim is defaulted because it could have been raised on state habeas corpus through the exercise of due diligence, but was not.

[7] Strickler rightly does not contend that he meets the "miscarriage of justice" exception which permits review of otherwise defaulted claims. Simply put, the evidence of Strickler's involvement in the abduction, robbery and murder of Whitlock was overwhelming and he "cannot demonstrate that the alleged [*Brady*] violation caused the conviction of an innocent person." *McCleskey*, 499 U.S. at 502.

1. Strickler's assertion of "cause" is insufficient.

Strickler's primary assertion of "cause" to excuse his uncontested default during the state collateral proceedings is that an isolated statement by the Warden in his motion to dismiss Strickler's habeas petition somehow thwarted his ability to discover and raise his *Brady* claim in state court. This is pure nonsense. The Warden's statement – "[trial] counsel were voluntarily given full disclosure of everything known to the government [and that] counsel, in fact, obtained all the information to which they were entitled under *Brady*" – was made more than two months ***after*** Strickler had filed a state habeas petition that contained no *Brady* claim, and referred only to Strickler's claim that his trial counsel had been ineffective in failing to file a *"Brady"* motion prior to trial. Obviously, a statement by the respondent long ***after*** Strickler had filed his state habeas petition could not have had any impact on Strickler's failure to raise a *Brady* claim in his petition as he was required to do under state law. *See* Va. Code § 8.01-655 (requiring that state habeas petitions conform to a prescribed form which mandates that all claims for relief be listed in the petition).

Under *McCleskey*, Strickler cannot show "cause" for his default unless the Warden's statement "prevented him from raising the claim" in his state habeas corpus petition. *Id.* at 502. In other words, if Strickler "could have by reasonable means obtained a basis to allege" his present *Brady* claim in state court, the Warden's statement is

irrelevant. *Id.* at 498. Entirely aside from the fact that the Warden's statement was made after, rather than before, Strickler filed his state habeas petition, Strickler clearly had "reasonable means" to pursue his claim in state court.

2. Strickler did not diligently investigate and pursue his claim during state collateral review.

Strickler could have undertaken in state court the identical "reasonable and diligent investigation" he later undertook in federal court when he discovered and raised his purported *Brady* claim.[8] Instead, Strickler undertook no investigation whatsoever during state habeas corpus. *McCleskey* thus forecloses any finding of "cause" to excuse Strickler's admitted procedural default.

In *McCleskey*, the prisoner complained of the admission of his statement to a cellmate, specifically alleging that the cellmate was an agent of the state and that placing that agent in his cell violated his Sixth Amendment right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964). McCleskey raised his *Massiah* claim in his first state habeas petition but omitted it from his first federal petition. He subsequently resurrected the *Massiah*

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[8] Strickler and his amicus inexplicably insist upon arguing at length that ***trial*** counsel had no obligation under *Brady* to diligently search for exculpatory material and they dispute the validity of the rule that, if the alleged exculpatory evidence was available to the defense at trial through the exercise of reasonable diligence, the government has no duty to disclose it. This, however, is the issue upon which Strickler sought, but was ***denied***, certiorari. (See Cert. Ptn. at i). The default in Strickler's case occurred on state habeas, not at trial, and the relevant question is whether Strickler undertook a "reasonable and diligent" investigation during the state collateral proceedings.

claim based upon a 21-page statement that he was provided a month before he filed a successive federal habeas petition. In response to McCleskey's *Massiah* claim, the government asserted that he had abused the writ by failing to include the claim in his first federal petition. The district court, however, excused McCleskey's default based on the unavailability of the 21-page document at the time of his first federal habeas petition and granted the writ. The Eleventh Circuit reversed, concluding that McCleskey had abused the writ.

On certiorari, this Court affirmed and held that an abuse of the writ occurs whenever a prisoner inexcusably neglects to include a claim in his first petition. This Court adopted the familiar "cause" default standard for determining whether such neglect is excusable:

> Cause . . . is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. ***If what petitioner knows or could discover upon reasonable investigation supports a claim for relief . . . what he does not know is irrelevant.***

McCleskey, 499 U.S. at 498 (emphasis added). This Court then concluded that the unavailability of the 21-page statement at the time of McCleskey's first federal habeas petition did not constitute "cause" because his knowledge of other facts was sufficient to "put [him] on notice" of the *Massiah* claim when the first federal petition was filed. *Id.* at 498-499.

As the Court of Appeals concluded in Strickler's case, *McCleskey* stands for the proposition that "cause" for a default can be established only if the factual basis for a claim was not reasonably available when the default

occurred.[9] (JA 422). Strickler's failure to pursue and raise his *Brady* claim in state court was a direct result of his failure to exercise reasonable diligence during state collateral proceedings. Here, as in *McCleskey*, "the record contains much evidence that [Strickler] knew, or should have known, about the [Stoltzfus materials]" at the time he filed his state habeas petition and Strickler was certainly "on notice" to promptly pursue his *Brady* claim. *McCleskey*, 499 U.S. at 499. It simply is beyond question that Strickler could have "by reasonable means obtained a sufficient basis to allege" his *Brady* claim in state court. *Id.* at 498.

First, as the Fourth Circuit correctly concluded, based upon his own cross-examination of Stoltzfus at trial, "Strickler knew that Stoltzfus was interviewed by Detective Claytor on several occasions and had identified Strickler in a photo line up." (JA 421). Moreover, a claim about trial counsel's alleged inadequate cross-examination of Stoltzfus and their alleged failure to impeach her credibility formed the basis of an ineffective counsel claim in Strickler's state habeas petition. (JA 206).

Strickler additionally was aware of a pre-trial interview Stoltzfus gave to a newspaper in which she reportedly stated that she had identified Donna Tudor from a photo line up as the "blonde girl" with Strickler and Henderson at the mall on January 5. (JA 53). This public

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[9] Although *McCleskey* was an abuse-of-the-writ case, the Court stated that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review" and that "the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ [require] that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts." *See McCleskey*, 499 U.S. at 490-491.

pretrial statement attributed to Stoltzfus not only conflicted with her later trial testimony that she did not know whom she had identified from the photographs and that she was "less confident" of her identification of the "blonde girl," but also was at odds with Tudor's testimony that she had not been at the mall with Strickler and Henderson on January 5 but had first met them at Dice's Inn sometime after nine o'clock that evening. (JA 101).

Despite Strickler's assertion in his state habeas petition that Stoltzfus should have been cross-examined more effectively at trial, despite his ***actual knowledge*** that Stoltzfus had spoken to Claytor on a number of occasions prior to trial, despite Strickler's ***actual knowledge*** that Stoltzfus' trial testimony differed in some respects from what had been reported in the newspaper, and despite the fact that, a month after the conclusion of trial, Stoltzfus publicly credited Claytor for helping her recognize that she had witnessed an abduction and described her "coherent" testimony at trial as the result of an "incredible effort by police to fit a zillion little puzzle pieces into one big picture" (JA 250), Strickler inexcusably undertook *no* investigation of Stoltzfus in the state habeas court. *See McCleskey*, 499 U.S. at 499 (McCleskey's knowledge of facts brought out at trial "alone" were sufficient to put him on notice to pursue a *Massiah* claim).

As part of his state habeas investigation, Strickler obviously could have interviewed his trial counsel and reviewed their files. Indeed, if Strickler had undertaken these elementary tasks at any time in the nine months between the time state habeas counsel was appointed and the time he filed his state habeas petition, he would have discovered that one of his two trial attorneys, Thomas Roberts, was aware of the substance of the information contained in the "Stoltzfus materials" and was aware that Stoltzfus' testimony appeared to have "become much

more detailed over time." (JA 371). Strickler also would have discovered that, despite Stoltzfus' trial testimony that she had spoken to Detective Claytor a number of times prior to trial, trial counsel's file contained none of Stoltzfus' statements to Claytor. (JA 300). Thus, it is clear that Strickler not only could have marshaled sufficient facts to construct a *Brady* claim in state court through the exercise of ***reasonable*** diligence, he could have done so with even ***minimal*** diligence.

As the Fourth Circuit found, moreover, Strickler could have pursued and discovered his *Brady* claim on state habeas just as he later did on federal habeas: by filing a discovery motion. (JA 421). In other words, Strickler could have asked the state habeas court to order the same production of the Harrisonburg police files concerning Stoltzfus' statements to Detective Claytor that the district court later ordered at Strickler's request.

Strickler's purported excuse for not seeking discovery in the state habeas court – that under Virginia law he was not ***entitled*** to discovery in state collateral proceedings as a matter of due course – must be rejected. The Court of Appeals saw through Strickler's obvious ploy to blame the Commonwealth for his indisputable lack of diligence: " . . . in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files." (JA 421). Indeed, the factual landscape at the time Strickler filed his federal habeas petition was virtually identical to the factual landscape existing at the time Strickler filed his state habeas petition. The only difference, of course, is that when Strickler filed his federal petition, as opposed to when he filed his state petition, the Warden had made the statement in his state habeas pleadings that Strickler says should constitute "cause" for

his default. ***If the statement did not deter Strickler from raising his Brady claim in his federal petition, it could not possibly have prevented him from raising it in his state petition.***

To be sure, Strickler was not "entitled" to discovery on state habeas. *See* Va. S.Ct. Rule 4:1(b)(5) (no habeas discovery "without prior leave of the court"). But neither was Strickler entitled to discovery on federal habeas corpus. *See* Rule 6(a), Rules Governing § 2254 Cases. That simple fact, however, did not prevent Strickler from raising his *Brady* claim o: filing a discovery motion in the district court.

Strickler, moreover, reveals a fundamental misunderstanding of Virginia law when he argues that a discovery motion in the state habeas court would have been unsuccessful because Virginia Supreme Court Rule 3A:11 rendered the police files "privileged and non-discoverable" and because, according to Strickler, the Virginia Supreme Court on direct review invoked Rule 3A:11 and "treated [his] other claims as though he had . . . made . . . a discovery motion." (Pet. Br. at 44). The fact of the matter is that on direct appeal the Virginia Supreme Court never purported to rule on any *Brady* claim or on the propriety of any discovery motion. It merely determined that Strickler's motion for a bill of particulars was properly denied by the trial court because Strickler had received all the discovery to which he was entitled under Rule 3A:11. *Strickler*, 404 S.E.2d at 233. Rule 3A:11, moreover, is totally irrelevant to Strickler's defaulted *Brady* claim: the default occurred on state habeas and Rule 4:1(b)(5), not Rule 3A:11, governs state habeas discovery.[10]

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[10] Rule 3A:11 governs discovery at the criminal trial and does not purport to govern "exculpatory" evidence under *Brady*. The rule merely delineates certain material that a

It is disingenuous for Strickler to suggest that comity and federalism would be "ill-served" by requiring criminal defendants to flood state courts with "speculative discovery requests" to preserve federal rights for later review. (Pet. Br. at 45). No judicial system should be deluged with ***speculative*** discovery requests, and such requests would be denied by any system of discovery that requires a showing of good cause. Because Strickler's federal discovery request was made and granted ex parte, the Warden is not in a position to comment on the "good cause" showing Strickler may or may not have made in support of his request. The undeniable fact remains, however, that whatever Strickler asserted as "good cause" on federal habeas could have been asserted on state habeas.

The real thrust of Strickler's argument is that he should be excused from seeking discovery in the state habeas court because he perceived that the request would be denied. Perceived futility, however, is no more "cause" for a prisoner's failure to properly develop and present ***facts*** to the state courts, *see Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-12 (1992) (applying "cause and prejudice" standard to defaulted facts), than it is for a prisoner's failure to present a constitutional ***claim*** to the state courts. *See Engle v. Issac*, 456 U.S. 107, 130 (1982) ("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim."). In any event, Strickler's perception is faulty as well as irrelevant. Although state habeas discovery requests must be decided, as they are in federal court, on a case-by-case basis, Virginia courts on a number of occasions have granted discovery of police files in capital

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defendant is entitled to even if such material is entirely ***inculpatory***.

habeas cases.[11] (See discovery orders and related materials in *Soering v. Warden, Fisher v. Murray,* and *Payne v. Thompson*; copies lodged with the Clerk's Office).

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[11] The amicus brief filed on behalf of the petitioner is based on the false premise that the Fourth Circuit concluded "that Strickler would have been entitled in state court to subpoena the police file." (Pet. Amicus Br. at 6). The Court of Appeals reached no such conclusion. Strickler was no more "entitled" to discovery during the state habeas proceedings than he was during the federal habeas proceedings. What the Fourth Circuit concluded was, not that Strickler would have been entitled to state habeas discovery, but that he could have asked the state court for such discovery pursuant to Rule 4:1(b)(5), just as he later asked the district court for discovery pursuant to Rule 6(a). (JA 421). Strickler's amicus brief also is wrong when it asserts that the Court of Appeals fashioned its ruling "from whole cloth" and that the Warden never asserted that Strickler could not show "cause" for his default because he could have asked the state habeas court for discovery. (See Warden's CA4 Br. at 12: asserting that Strickler could not establish cause because he "never sought to review police files nor did he ever ask the state habeas courts for discovery"). Finally, the amicus brief's litany of cases in which Virginia courts have denied discovery in capital habeas cases is meaningless. Conspicuously absent from the amicus' submission are the conclusory, pro forma discovery motions which were filed in those proceedings and which could not have justified a legitimate finding of "good cause" for discovery in either state or federal court. And, despite the amicus' suggestion that police files never can be the subject of discovery in state habeas proceedings, the undeniable fact is that Virginia courts have ordered such discovery when the petitioner has made the requisite showing of good cause. (See lodged material cited in text).

3. The Warden's isolated statement in a pleading filed after Strickler filed his state habeas petition cannot excuse Strickler's failure to raise his *Brady* claim in state court.

Notwithstanding his failure to conduct a reasonable and diligent investigation in the state court, Strickler nevertheless seeks to hold the Commonwealth responsible for his failure to raise the *Brady* claim in his state habeas petition. His strategy is to allege that the Commonwealth engaged in misconduct when the Warden stated in his response to Strickler's state habeas petition that "[trial] counsel were voluntarily given full disclosure of everything known to the government [and that] counsel, in fact, obtained all the information to which they were entitled under *Brady*." (JA 212-213). Just as the assertion of bad faith on the part of the State in *McCleskey* did not "detain [this Court] long," *McCleskey*, 499 U.S. at 501, neither should Strickler's equally misleading assertion. Simply put, "the issue [of bad faith] is not presented in this case despite all [of Strickler's] emphasis on it." *Id.*

The Warden's statement obviously was not an assertion that he had reviewed the Commonwealth's files for possible exculpatory material. The Warden, who was a defendant in a civil lawsuit brought by Strickler, was merely answering Strickler's claim that his trial counsel had been ineffective in failing to file a general motion requesting the disclosure of "*Brady*" material.[12] The Warden's statement simply represented his position that,

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[12] Although it is not an issue in this case because Strickler has not raised it in either his certiorari petition or opening brief, a criminal defendant's ***trial*** right to the disclosure of exculpatory evidence does not extend to the realm of state collateral proceedings where the prisoner is the plaintiff and his custodian is the defendant. This Court repeatedly has refused to extend trial rights, that were established as a shield to protect a

based upon what Strickler's trial counsel knew at the time of trial, they were not ineffective in electing not to file a formal *Brady* motion.[13] In any event, Strickler's later investigation and pursuit of the claim in federal court establishes beyond question that he did not regard the Warden's statement as a guarantee that the Commonwealth possessed no exculpatory evidence not disclosed at trial. Simply put, it would be unreasonable for this Court to conclude that what obviously did not deter Strickler in federal court somehow "prevented" him from raising his claim in state court and "caused" him to default his claim.

Even if, however, the Warden's statement could be divorced from the context in which it was made and even if it could be construed as an affirmative representation that there was no exculpatory evidence left to be discovered – and it certainly cannot – the timing of the statement still would preclude the statement from serving as "cause" for Strickler's failure to include the *Brady* claim in his state habeas petition. The Warden's statement was contained in a motion to dismiss Strickler's state habeas petition filed on November 12, 1992 – eleven months after habeas counsel had been appointed to represent Strickler *and two-and-one-half months after Strickler filed his state*

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defendant against the State in the context of a criminal prosecution, to post-trial civil proceedings where the prisoner is attacking a presumptively valid state court criminal judgment. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

[13] Indeed, it is noteworthy that in the court below Strickler acknowledged that he did not perceive the Warden's statement as an unequivocal assertion that the Warden had examined the Commonwealth's files for exculpatory evidence. (See Strickler's CA4 brief at 27 n.9: "***If*** counsel for the Warden in fact examined the prosecutor's files before making this representation . . . "; emphasis added).

habeas petition which contained no claim of *Brady* error. (JA 204-212). In short, nothing the Warden said in November of 1992 could have prevented Strickler from raising a *Brady* claim in the habeas petition he already had filed in September of that year.

Strickler cites *Amadeo v. Zant*, 486 U.S. 214 (1988), as support for his proposition that the Warden's statement is "cause" for his default. In *Amadeo*, this Court stated that government concealment of evidence could be "cause" for a procedural default if the concealment "***was the reason*** for the failure of a petitioner's lawyers to raise the [claim] in the trial court." *Id.* at 222 (emphasis added). Such clearly is not the situation in Strickler's case.

Amadeo defaulted his equal protection challenge to his grand jury and trial jury but did so only because he could not have discovered that at the time of trial the State was intentionally discriminating by race in the selection of all prospective jurors. *Id.* at 216-217. When Amadeo learned after trial, by a "mere fortuity," of a hidden memorandum detailing the State's intentional underrepresentation of black persons on its jury lists, he asserted an equal protection challenge on direct appeal but the state court ruled that the challenge came too late. *Id.* at 218. After the Eleventh Circuit reversed a grant of federal habeas relief, this Court granted certiorari and reversed the judgment of the Court of Appeals, concluding that the district court correctly found that Amadeo had "cause" for his default: the hidden memorandum was not reasonably discoverable at the time of trial because it deliberately had been concealed by the government. *Id.* at 224-229.

Strickler's case, however, is nothing like *Amadeo*. No evidence was "concealed" from Strickler during the state habeas proceedings where the default occurred. Strickler was free to include any *Brady* claim he wished in his state habeas petition but he failed to do so, even though he alleged elsewhere in his petition that his trial counsel

were ineffective in failing to pursue *Brady* material. And, most importantly, Strickler failed to ask the state habeas court for the same discovery he later sought and obtained in federal court. The indisputable fact is that, when Strickler finally chose to file a discovery motion seeking access to the police files, such discovery was granted and the "Stoltzfus materials" were turned over to Strickler. *See McCleskey*, 499 U.S. at 501 (noting that McCleskey had mischaracterized government conduct as wrongful because, in part, the police "turned over the 21-page document upon request."). There is no reason to believe that the result would have been any different if Strickler had filed his discovery request in state court rather than federal court. As the Fourth Circuit concluded, if Strickler had asked the state habeas court for discovery, "it is likely the state court would have ordered the production of the [police] files." (JA 421).

Unlike the petitioner in *Amadeo*, Strickler clearly was "on notice" of a possible *Brady* claim. Indeed, as this Court noted when it rejected McCleskey's similar attempt to liken his case to *Amadeo*: "even if the State intentionally concealed the [evidence in question] the concealment would not establish cause here because, in light of [petitioner's actual and constructive knowledge of the possible *Brady* claim,] any . . . concealment would not have prevented him from raising the claim in [state court]." *See McCleskey*, 499 U.S. at 502.

Numerous times this Court has said that, consistent with the principles of federalism and comity, the States hold the initial responsibility for vindicating a state prisoner's federal constitutional rights. *See, e.g., Coleman*, 501 U.S. at 748; *Engle*, 456 U.S. at 128; *McCleskey*, 499 U.S. at 491. By unreasonably failing to pursue and raise his *Brady* claim in state court, Strickler deprived Virginia of any opportunity to adjudicate his claim and thereby encouraged "federal intrusion" into the state criminal process. *Engle*, 456 U.S. at 129. This Court should refuse to reward

such disrespect for the state judicial system, especially where, as here, the prisoner's default is undisputed, his assertion of "cause" is patently inadequate and his guilt is clear-cut.

II. EVEN IF STRICKLER COULD SHOW "CAUSE" FOR HIS DEFAULT, HE CANNOT SHOW "PREJUDICE" BECAUSE HIS *"BRADY"* CLAIM HAS NO MERIT.

A. Strickler must establish both "cause" and "prejudice" before his default may be excused.

Even if it were assumed that Strickler somehow could establish sufficient "cause" to excuse his default, he also would have to establish "actual prejudice" before the merits of his barred *"Brady"* claim could be considered. To establish "actual prejudice," it is Strickler's burden to establish "not merely that the errors at his trial created a possibility of prejudice, but that the errors worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982). The district court failed to apply or even acknowledge the *Frady* prejudice test. The Fourth Circuit, however, correctly applied *Frady* and held that, because the "Stoltzfus materials" did not meet the materiality test set forth in *United States v. Bagley*, 473 U.S. 667 (1985), Strickler had not established "actual prejudice." (JA 424). The Court of Appeals thus properly declined to excuse Strickler's uncontested default.

B. Strickler cannot satisfy the *Brady/Bagley* standard.

The prosecution has an affirmative duty to disclose evidence, including impeachment evidence, favorable to an accused where the evidence is material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *Bagley*, 473 U.S. at 674; *Kyles v. Whitley*, 514 U.S. 419

(1995). Evidence is "material," however, only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 687; *Kyles*, 514 U.S. at 433. A reasonable probability of a different result does not exist unless the previously undisclosed evidence "undermines confidence in the outcome of trial." *Bagley*, 473 U.S. at 678; *Kyles*, 514 U.S. at 434.

In other words, to establish *Brady* "prejudice," Strickler must show that the "Stoltzfus materials" create a reasonable probability that the outcome of his trial would have been different if the documents had been disclosed to the defense at the time of trial. *Bagley*, 473 U.S. at 677. There can be no *Brady* violation, however, if the information contained in the allegedly withheld documents was actually known to the defense. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) ("The rule of *Brady* . . . arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but ***unknown to the defense.***") (emphasis added). Keeping these principles in mind, it is clear that the Fourth Circuit was correct when it determined that Strickler had failed to establish the required prejudice. The substance of the allegedly withheld evidence was known to the defense, the evidence was not exculpatory and, even if it was marginally exculpatory, it was not material.

1. Strickler's admissions that he was at the mall, in the victim's car with the victim and at the murder scene preclude a finding of materiality.

At allocution and in the pre-sentence report, Strickler admitted that he was at the Valley Mall on January 5, 1990, that he got into the victim's car with the victim and

that he was present at the murder scene during Whitlock's murder. Given these express admissions by Strickler, Strickler cannot possibly demonstrate that there is a reasonable probability that the result of his trial would have been different had the "Stoltzfus materials" been disclosed at the time of trial. In light of Strickler's admissions at trial, it is nothing short of outrageous that he asserts on brief that, without Stoltzfus' testimony, there was no proof that he was even at the mall when Whitlock was abducted or that he had any contact with Whitlock's vehicle until sometime after she was murdered. (Pet. Br. at 18, 33). Strickler may attempt to argue that his admissions at allocution and in the pre-sentence report are of no significance because they occurred after the jury had rendered its verdicts. In *Wood v. Bartholomew*, 516 U.S. 1 (1995), however, this Court, in determining "materiality" under *Bagley*, considered the allegedly exculpatory evidence as well as evidence that "the state could likely introduce on retrial." *Id.* at 8.[14]

The *Bartholomew* approach comports with the purpose of *Brady*. The "overriding concern" of *Brady* and its progeny is, after all, "with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. It would be a perversion of justice to grant Strickler relief on a *Brady* claim related to Stoltzfus' trial testimony when that testimony served only to identify Strickler as one of the men who abducted Whitlock at the mall and it is beyond question that the evidence the prosecution could introduce at any retrial – Strickler's own admissions – would establish that fact beyond any conceivable doubt.

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[14] The *Brady* claim in *Bartholomew* was a guilt-stage claim and the State clearly would have been able to introduce at the guilt stage of any retrial evidence of the prisoner's confession to a cellmate which had been introduced only at the penalty stage of the original trial. *Id.*

Even if Strickler were permitted to disavow his post-verdict admissions, however, he expressly conceded in his guilt-stage closing argument that he had abducted and robbed Whitlock. (JA 192). Strickler then used his strategic concession to argue to the jury that the Commonwealth had not proven that he was guilty of capital murder. According to Strickler, the prosecution had not established that he, rather than Henderson, had killed Whitlock, because the physical evidence which the Commonwealth argued linked him to the murder in the cornfield – mainly the hair strands that forcibly had been pulled from his head – just as easily could have been deposited on Whitlock's blouse during the struggle that Strickler admitted had occurred *when he had abducted Whitlock at the mall.* (JA 192). Strickler's express, unequivocal admissions before the jury preclude any finding of materiality.[15]

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[15] Strickler asserts that the value of the undisclosed evidence should be assessed based upon its abstract potential impact and not upon the significance it would have had to the case as it actually was tried. (Pet. Br. at 37). This approach, however, specifically has been rejected by this Court. *See Agurs*, 427 U.S. at 112 n. 20 (rejecting argument that *Brady* standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial). Even assuming that Strickler's trial strategy somehow may have been different had the documents been disclosed, in the absence of a strategic concession to the abduction, Strickler's theory at trial would have had to have been either that he never was at the mall on January 5, 1990, or that he was at the mall but did not abduct Whitlock. The "desperate implausibility" of either of these theories is apparent. *See Kyles*, 514 U.S. at 461 (Scalia, J., dissenting) (" . . . the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind."). If Strickler had asserted that he never was at the mall on January 5, the assertion would have been contradicted by the compelling testimony of two disinterested witnesses, Virginia Smith and

2. The defense knew the substance of the alleged exculpatory information at the time of trial.

The uncontradicted affidavit of one of Strickler's two trial attorneys, Thomas Roberts, conclusively establishes that Strickler was aware at the time of trial of the facts contained in the "Stoltzfus materials."[16] Although Roberts could not recall specifically whether he actually had seen the "Stoltzfus materials," he was certain that he was aware at the time of trial that Stoltzfus' account of what she had observed at the mall "had become much more detailed over time." (JA 371). Because at least one of Strickler's trial attorneys unquestionably knew the essential facts which would have permitted Strickler to take advantage of the alleged "exculpatory evidence," there is

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Donna Warner – both of whom, along with Stoltzfus, unequivocally placed him at the mall that afternoon. Alternatively, Strickler would have been left with the implausible assertion that, although he was at the mall when Whitlock was abducted, he had nothing to do with her abduction and only through sheer coincidence came into possession of her car and was seen driving it into the field where she was murdered less than an hour later.

[16] The Court of Appeals did not discuss Roberts' affidavit. The district court, however, accepted Roberts' affidavit "as true" for purposes of deciding Strickler's motion for summary judgment. (JA 399). In his affidavit, Roberts stated:

> I have reviewed the [Stoltzfus materials] and although I cannot recall if I have seen these specific documents, ***I do remember the information contained in them. I remember discussing with [co-counsel] Mr. Bobbitt the possibility that Ms. Stoltzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time.*** It seemed too good to be true.

(JA 371, emphasis added).

no *Brady* violation. *See Agurs*, 427 U.S. at 103 (exculpatory information must be "unknown to the defense").

There also is no *Brady* violation in Strickler's case because, as Strickler himself established through discovery in the district court, three of the eight items proffered on federal habeas (exhibits 2, 7 and 8; JA 307-311, 319-327) were in the Commonwealth's Attorney's file prior to trial and thus were available and known to Strickler pursuant to the Commonwealth's undisputed open file policy.[17] (JA 368). A detailed review of the eight documents establishes that the five documents Strickler

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[17] In the district court, Strickler submitted interrogatories to the Commonwealth's Attorney and he also obtained affidavits from William Bobbitt, one of his trial attorneys, and from Humes Franklin, Ronald Henderson's trial lawyer. The prosecutor's assertions under oath were clear and unequivocal that documents 2, 7 and 8 were in his file when Strickler's attorneys reviewed the file prior to trial. Bobbitt, on the other hand, merely said that he did not recall seeing exhibits 1-7 of the "Stoltzfus materials" when he reviewed the Commonwealth's file prior to trial and that a post-trial review of his trial files did not locate any of the documents. That, of course, is a far cry from stating unequivocally that the documents were not in the Commonwealth's file when he reviewed it. And although Bobbitt was presented with copies of all eight exhibits when he executed his affidavit, noticeably absent from his affidavit is any assertion that he never had seen exhibit 8 of the "Stoltzfus materials." (JA 300: "I have reviewed the attached Exhibits 1-7 . . . I have no recollection of seeing any of this material in the Commonwealth's files. . . . "). In any event, a prosecutor has no duty to insure that a defense attorney actually notices a particular document or perceives its significance when he reviews the prosecutor's file. The fact that Strickler's trial attorneys may not have made copies of documents 2, 7 or 8, or used the information at trial is entirely consistent with the Fourth Circuit's conclusion that the information simply was not of any substantial value to the defense. In other words, the documents were not "material."

allegedly was not provided (Exhibits 1, 3, 4, 5 and 6; JA 306-307, 311-318) contain no information substantially different from what is contained in the three disclosed documents.[18]

Strickler contends that exhibit 1, handwritten police notes, is exculpatory because it establishes that Stoltzfus initially could not identify Leanne Whitlock as the girl abducted by Strickler. (JA 306). Exhibit 7, however, which Strickler had access to through the Commonwealth's open file policy, establishes the very same thing. It is clear from exhibit 7 that Stoltzfus identified Whitlock days after the crime and only *after* she and Whitlock's boyfriend, John Dean, viewed pictures of Whitlock in each other's presence. (JA 318).[19]

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[18] Exhibits 1, 3, and portions of exhibit 2, moreover, bear the same date and establish that in Stoltzfus' initial January 19, 1990 visit with the police she provided a description of Strickler, Henderson and the blonde girl, and identified Strickler and Henderson from a photo array. Stoltzfus also told the police at that time that she could not identify the black female victim. Finally, in that initial interview, Stoltzfus recounted Whitlock's abduction – including the fact that Whitlock was driving a blue car with West Virginia tags and that Strickler approached Whitlock's vehicle, pounded on the window and then jumped into the car and began hitting Whitlock. (JA 306-307, 311-312). Strickler's assertion that any "variations" between these documents render them "exculpatory" cannot withstand scrutiny. A witness' statements to the police on a particular date cannot be deemed "exculpatory" merely because various parts of the same interview were recorded in separate documents.

[19] This same information also was known to Strickler through the Roanoke newspaper article, a copy of which Strickler unquestionably possessed at the time of trial. (JA 372-381). In that article, Stoltzfus mentioned that she viewed pictures of Whitlock with John Dean to verify that Whitlock was the woman she had seen abducted. (JA 377). Whitlock's identity was never an issue at trial, however, and any attempt to "impeach" Stoltzfus by suggesting that the black woman in the blue car was not Whitlock would have been ludicrous.

Similarly, exhibit 3, a handwritten document entitled "Observations," does not contain any information not fully disclosed in exhibits 2, 7 and 8. In exhibit 3, for example, Stoltzfus described the car Whitlock was driving as a "dark blue new sports car" with "West Virginia tags." Identical information is contained in exhibits 2 and 8, which Strickler had seen prior to trial. (JA 310-311, 323). In exhibit 3, Stoltzfus described Strickler as being "West Virginia looking" and a "scroungy bum type" with "long blonde scraggly hair." Stoltzfus' description is repeated, practically verbatim, in exhibits 2 and 8 which Strickler had seen prior to trial. (JA 308, 324).

In exhibit 3, Stoltzfus gave the following account of Whitlock's abduction: Strickler approached Whitlock's car, pounded on the car window, entered the car and began hitting Whitlock while Whitlock sounded the car horn. The blonde girl with Strickler then attempted to enter the car by putting one foot in the back seat but the car lurched forward. Finally the female and Henderson got into the back seat of the car. This narrative, however, also is fully contained in exhibits 2 and 8, which were in the prosecutor's file which Strickler reviewed prior to trial. (JA 307-311, 322-327).

Exhibit 4 is a letter from Anne Stoltzfus to Detective Claytor. In this letter, Stoltzfus constructed a time line of her January 5 journey through the Valley Mall and noted that she initially encountered Strickler and Henderson at a music store. All this information is contained in exhibit 8. (JA 322-323). Also in exhibit 4 Stoltzfus admitted that she did not initially recall being at the mall on January 5, 1990 or thought that perhaps she had been there later in the evening. Stoltzfus, however, confirmed her presence at the mall on January 5 and at the time of Whitlock's

abduction with several cash register receipts and a canceled check. (JA 313-314).[20]

Finally, it is clear that the information contained in exhibits 5 and 6 also was disclosed to Strickler prior to trial. Exhibit 5 is titled "My Impressions of the Car." In it, Stoltzfus accurately described John Dean's vehicle, including the fact that the car had West Virginia license plates. Information about the car and its West Virginia tags had been reported to the police in Stoltzfus' initial police interview and was made available to Strickler in exhibit 2 which was contained in the prosecutor's open file. Exhibit 6, on the other hand, is a short letter wherein Stoltzfus acknowledged that, after reviewing pictures of Whitlock with John Dean, she positively identified Whitlock as the black female she saw abducted at the mall. (JA 318). This information, however, had been fully disclosed to Strickler in exhibit 7 and through the Roanoke Times article which the Strickler defense team had in its possession prior to trial.

Strickler, then, unquestionably possessed – through one of his trial attorney's actual knowledge and through the prosecutor's open file disclosure of exhibits 2, 7 and 8 – the substance of all the relevant information contained in the allegedly withheld documents. That being the case,

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[20] The district court's conclusion that references in exhibit 4 to Stoltzfus' daughter and to the daughter's recollections may have constituted a basis for ***barring*** Stoltzfus' testimony altogether is frivolous. In this regard, Strickler's reliance upon *Manson v. Brathwaite*, 432 U.S. 98 (1977), is misplaced. *Brathwaite* held that due process did not compel exclusion of pretrial identification evidence obtained by a suggestive photo identification if, under the totality of the circumstances, the identification was reliable. There was nothing even remotely suggestive about Stoltzfus' pretrial identification of Strickler, who never has challenged the admissibility of that identification.

Strickler cannot possibly show "actual prejudice" as the result of an alleged *Brady* error.[21]

3. The "Stoltzfus materials" are inculpatory, not exculpatory.

Even a cursory examination of the allegedly suppressed documents, moreover, establishes that each of them, on its face, is wholly inculpatory. Indeed, Strickler does not claim otherwise. Instead, his argument is founded entirely upon his assertion that claimed "inconsistencies" between each of these statements rendered them exculpatory.[22] For a number of reasons, whatever minor variations existed among Stoltzfus' various accounts hardly required their production.

First, the prosecution clearly has no duty under *Brady* to make a detailed accounting of its investigation. *Agurs*, 427 U.S. at 109; *Moore v. Illinois*, 408 U.S. 786, 795 (1972). Strickler's assertion that he constitutionally was entitled to pretrial disclosure of each of Stoltzfus' ***inculpatory***

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[21] In his discussion of the exhibits, Strickler attempts to mislead this Court by asserting that exhibit 1 establishes that Stoltzfus initially could not identify Strickler. While the exhibit contains no description of the "1st W/M," it nowhere indicates that Stoltzfus could not identify that person. (JA 306). The fact of the matter is that Stoltzfus ***did*** identify Strickler in her initial encounter with the police. (JA 310). Strickler also asserts that exhibit 8 was one of the last two documents prepared by Stoltzfus. (Pet. Br. at 38 n.15). Exhibit 8, however, is ***undated*** and the record does not disclose when it was prepared. (JA 322).

[22] To be clear, there are no per se "inconsistencies" among the various documents. Stoltzfus, for example, never alternatively described Strickler as blonde-haired then red-headed, or first as husky then as slim. There are, however, minor variations among the documents in that each document does not contain a full recitation of everything that Stoltzfus observed at the mall when the victim was abducted.

statements not only is contrary to Virginia law, *see* Rule 3A:11(b)(2), Rules of the Supreme Court of Virginia (prohibiting discovery by a criminal defendant of statements made by prosecution witnesses) but should be recognized for what it really is: an attempt to expand *Brady* to require exactly what *Agurs* says is not required – full disclosure of the results of a police investigation. Under clearly established law, prosecutors are "under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." *Agurs*, 427 U.S. at 109.[23]

It is, moreover, completely unremarkable that a citizen witness such as Stoltzfus initially expressed some hesitancy and uncertainty when speaking with the police about this undoubtedly important police investigation. Such witnesses naturally want to be sure that what they tell police is accurate and cannot reasonably be expected to say exactly the same thing on each occasion that they discuss their observations with the police. Requiring disclosure of any and all such uncertainties is neither reasonable nor realistic.[24]

Finally, the alleged discrepancies among Stoltzfus' various statements do not give rise to any inference that Stoltzfus' testimony was unreliable, untruthful or that Strickler was not one of the two men directly involved in

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[23] Indeed, this Court could not grant Strickler's implicit request to expand the scope of *Brady* without violating the "new rule" doctrine. *See generally Graham v. Collins*, 506 U.S. 461, 467 (1993) ("A holding constitutes a 'new rule' . . . if it . . . 'imposes a new obligation on the States.' ").

[24] *See, e.g., United States v. Comonsona*, 848 F.2d 1110, 1115 (10th Cir. 1988) ("If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense"); *United States v. Phillip*, 948 F.2d 241 (6th Cir. 1991) (no *Brady* violation because suppressed statements, "taken as a whole, are heavily inculpatory"), *cert. denied*, 504 U.S. 930 (1992).

Whitlock's abduction, robbery and murder. First of all, Strickler has admitted he was at the mall and with Whitlock. The allegedly suppressed documents and Stoltzfus' trial testimony are, moreover, entirely consistent with other independent evidence which conclusively established that Strickler was at the Valley Mall at the same time Whitlock was supposed to return John Dean's car to him at the mall. For instance, the mall security guard saw Strickler in the mall food court at around 6:45 p.m., wearing jeans and a jean jacket. Strickler left the food court and headed toward the front entrance of the mall near J. C. Penney and Watsons. (JA 31-32). Whitlock, on the other hand, was last seen by her roommates around 6:30 p.m. when she left the apartment they shared to go to the mall to return Dean's blue car with West Virginia plates. (JA 22). Consistent with all of this testimony, and consistent with the allegedly withheld documents, Stoltzfus testified that, after she had left a mall music store at approximately 6:45 p.m. and returned to her car, she saw Strickler, who was wearing jeans and a denim jacket, in the mall parking lot near J. C. Penney, Watsons and the front entrance of the mall. Strickler then accosted Whitlock who was driving a blue car with West Virginia tags. (JA 92, 94, 99).[25]

Strickler's purported "inconsistencies," moreover, deal only with trivial matters ***which were not contested at trial***. For example, Strickler never contested that it was Whitlock who was abducted at the Valley Mall. It is hardly "exculpatory" then that Stoltzfus initially told police she thought she would be unable to identify the female she saw abducted. Likewise, there was never any

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[25] Stoltzfus also testified that, while in the mall, Strickler had been accompanied by a woman he called "Donna." Donna Lynn Warner testified that while shopping at the Valley Mall on January 5, she encountered Henderson and Strickler and had spent part of the afternoon with them. (JA 27-28).

dispute about whether Whitlock was driving Dean's dark blue car with West Virginia tags when she was abducted. Given that Strickler did not contest that fact at trial, Stoltzfus' pretrial description of the car contained in exhibit 5 likewise cannot be considered in any sense "exculpatory."

Given Strickler's express admissions at trial, and the insignificant and collateral nature of the variations between Stoltzfus' several pretrial statements, the "Stoltzfus materials" in no way can be considered "exculpatory."[26] *Bagley*, 473 U.S. at 676 n. 7 (a prosecutor does not commit error by failing to disclose "insignificant" evidence to the accused).

4. The Fourth Circuit correctly ruled that the information was not "material."

Even assuming that the "Stoltzfus materials" were in some technical sense "exculpatory," under no circumstances would the attempted impeachment of Stoltzfus with the allegedly non-disclosed statements have created a "reasonable likelihood that the result of Strickler's trial would have been different." *Bagley*, 473 U.S. at 687; *Kyles*, 514 U.S. at 433. As the Fourth Circuit correctly recognized, "Stoltzfus' testimony ***was not*** critical to the Commonwealth's case . . . the Stoltzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of trial." (JA 425). Stoltzfus was cross-examined thoroughly by Strickler about the only plausible subject upon which she could be impeached – t[illegible] fact

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[26] Strickler's assertion that exhibit 2 is somehow "exculpatory" because it contains a notation that, after Stoltzfus had identified Strickler from a photo lineup, she advised the police "that she might be able to identify [Strickler] positively if seen in person" must also be rejected. (JA 310). The fact of the matter is that exhibit 2 establishes only the ***inculpatory*** fact that Stoltzfus identified Strickler prior to trial.

that, after she had witnessed such an obviously distressing abduction, she did not report it to the police. (JA 50-53).

Strickler, moreover, was convicted of capital murder in the commission of robbery while armed with a deadly weapon, as well as capital murder during the commission of abduction with the intent to extort money or a pecuniary benefit, or with the intent to defile.[27] *Strickler*, 452 S.E.2d at 650-651. As the Fourth Circuit recognized, even without Stoltzfus' testimony, there was overwhelming evidence that Strickler abducted and robbed Whitlock, and Stoltzfus' testimony was not even marginally relevant to the robbery. (JA 425). Strickler, in fact, acknowledges on brief that his *Brady* claim would have no merit and his capital murder conviction would remain valid if his conviction is "supported [with] compelling evidence of armed robbery." (Pet. Br. at 35). The record here is replete with such compelling evidence and, in any event, clearly will not support a conclusion that there is "a reasonable probability of a different result."

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[27] At the time of Strickler's offense, abduction of a person over the age of twelve with intent to defile was not a predicate offense to capital murder in Virginia. *Strickler*, 452 S.E.2d at 651. On state habeas corpus, Strickler for the first time challenged the jury instruction which permitted the jury to find him guilty of such an offense. The Virginia Supreme Court ruled that Strickler's direct challenge to the instruction was defaulted because it could have been raised at trial and on direct appeal. *Id.* Strickler's assertion that he was denied effective assistance of counsel at trial because his attorney failed to object to the "intent to defile" language in the instruction was rejected in light of the "overwhelming evidence that Strickler committed the willful, deliberate and premeditated killing of Leanne Whitlock in the commission of robbery while armed with a deadly weapon." *Id.* at 652. Strickler's ineffective counsel claim no longer is at issue.

The undisputed independent evidence established that at about 4:30 p.m. on January 5, 1990, Whitlock borrowed John Dean's 1986 blue Mercury Lynx automobile and agreed to return the car to Dean "an hour or two later" at the Valley Mall. At approximately 6:00 p.m., Whitlock ate a fast-food dinner and then left to return the borrowed car to Dean at the mall around 6:30 p.m. (JA 22). When Whitlock left to return the car, she was wearing a pair of pearl earrings that belonged to her mother. (JA 23). Whitlock, however, never returned the car and the undisputed evidence established that on the day of Whitlock's disappearance, Strickler and Henderson spent the afternoon at the Valley Mall and were last seen leaving the mall at about 6:45 p.m. (JA 34).

Strickler had been spotted earlier in the afternoon trying to steal a car from the mall parking lot and he subsequently was identified at 7:30 p.m. as he drove Dean's car into the field in which Whitlock was murdered. (JA 68). Unchallenged evidence also established that Whitlock was murdered "at an absolute maximum, six hours after she ate and probably much less than that." (JA 112). The medical examiner opined that Whitlock's murder could have occurred as little as an hour or two after she had eaten. (JA 112). Whitlock was murdered in the cornfield when her skull repeatedly was crushed with the 69-pound rock. Strickler concedes that after Whitlock's murder he drove Whitlock's car (Pet. Br. at 18) and this is confirmed by his fingerprints which were found throughout the vehicle. (JA 130). It also is undisputed that Strickler possessed and unsuccessfully attempted to use Whitlock's bank card and that he gave Tudor the pearl earrings Whitlock was wearing on the night of her murder. Finally, according to Donna Tudor, on the night of January 5 Strickler spoke of a violent event earlier in the evening and admitted using a "rock crusher" on a "nigger." (JA 92-93).

As the Virginia Supreme Court found, the evidence overwhelmingly established that Whitlock was murdered during the commission of an armed robbery. *See Strickler*, 452 S.E.2d at 653. Stoltzfus' testimony was completely unrelated to that conviction. It cannot be said, therefore, that there is a reasonable probability that the result of Strickler's trial would have been different had Stoltzfus been "impeached" with the information Strickler belatedly developed and presented in his federal habeas action. *Bagley*, 473 U.S. at 687. There simply is "no reasonable doubt about [Strickler's] guilt whether or not the [impeachment] evidence is considered." *Agurs*, 427 U.S. at 112-113. Strickler, therefore, has not established "prejudice" to excuse his failure to raise his *Brady* claim in state court.[28]

Despite the overwhelming and independent record evidence of armed robbery, Strickler asserts, and the district court erroneously concluded, that Stoltzfus' testimony was somehow "critical" to the robbery predicate because, without it, there supposedly was no evidence that Strickler robbed Whitlock while he was armed with a deadly weapon.[29] (JA 394). The Virginia Supreme Court,

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[28] The uncontested, "non-Stoltzfus" evidence also overwhelmingly established that Strickler and Henderson abducted Whitlock to obtain Dean's vehicle and then murdered her shortly thereafter.

[29] The district court concluded and Strickler argues that Stoltzfus was the critical witness for the armed robbery predicate based on what she observed in the parking lot because the Commonwealth briefly argued in closing that Whitlock may have been looking at a knife when she looked down toward her side as Strickler sat beside her in the car. (JA 394). Strickler, however, clearly overstates his case when he argues that the prosecutor's evidence of armed robbery flowed "almost entirely from Stoltzfus." (Pet. Br. at 35). The Commonwealth's summation also cited the testimony of Strickler's own mother

however, found as a matter of historical fact, that the evidence was "overwhelming that Strickler committed the willful, deliberate and premeditated killing of Leanne Whitlock in the commission of robbery ***while armed with a deadly weapon.***" The state court also concluded that the 69-pound rock with which Strickler and Henderson killed Whitlock constituted a deadly weapon as a matter of Virginia law. *Strickler*, 452 S.E.2d at 653 (emphasis added). Although federal law required the district court to defer to the state court findings of historical fact, *see Sumner v. Mata*, 449 U.S. 539, 546-549 (1981); former 28 U.S.C. § 2254(d), and to the Virginia Supreme Court's determination of a matter of state law, *see Estelle v. McGuire*, 502 U.S. 62, 67 (1991), the district court ignored both of these fundamental precepts of federal collateral review.[30]

Strickler also asserts that the Stoltzfus documents were material because Stoltzfus "portrayed Strickler as

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that Strickler "always" carried a knife with him, as well as the testimony of Donna Tudor who placed a knife in Strickler's possession later in the evening. (JA 170).

[30] Strickler erroneously asserts that, despite the Virginia Supreme Court's conclusion that the rock constituted a deadly weapon as a matter of Virginia law, the respondent is not free to rely on the "rock theory" of armed robbery because such a theory supposedly was not argued at trial. In closing argument, however, the Commonwealth argued:

> So it is really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is to [sic] big to be called a rock and to [sic] small to be called a boulder. I don't know what you call it, I'll just call it a rock but this rock here, sixty-nine pounds, was the murder weapon.

(JA 167-168). Obviously, if the rock was the murder weapon and the murder was committed during a robbery, Strickler was "armed" with the rock when he committed both the robbery and the murder.

the instigator" of the violent acts against Whitlock. (Pet. Br. at 36). Presumably, Strickler is asserting that without impeachment of Stoltzfus, the jury was more likely to believe that he was the person who repeatedly struck Whitlock in the head with the rock while Henderson restrained her. Donna Tudor, however, testified that Strickler told her shortly after the murder that ***he*** had used a "rock crusher" on "a nigger" so that "it" would not give him "any more trouble." (JA 92-93, 106). Under Virginia's capital murder law, moreover, it was immaterial whether it was Strickler or Henderson who dropped the rock on Whitlock's head while the other one held her down. Both were equally culpable and subject to the death penalty. Indeed, this was the primary point of law decided on Strickler's direct appeal to the Virginia Supreme Court.[31] *Strickler*, 404 S.E.2d at 235; *see also Coppola v. Commonwealth*, 257 S.E.2d 797, 806 (Va. 1979), *cert. denied*, 444 U.S. 1103 (1980).

Only when the "reliability of a given witness may well be determinative of guilt or innocence" does the nondisclosure of evidence affecting credibility violate the rule of *Brady*. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *Bagley*, 473 U.S. at 677. Here, it is impossible to conclude that the outcome of Strickler's trial would have been any different if Stoltzfus never even had testified, let alone if she had testified but merely been "impeached" as Strickler now suggests. Because the evidence in question

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[31] Strickler cannot rely on the fact that Henderson was convicted by a separate jury of only first-degree murder. Unlike Strickler's jury, Henderson's jury erroneously was instructed that it could not convict Henderson of capital murder unless the evidence established that he rather than Strickler had struck Whitlock with the rock. The fact that a different trial judge erroneously afforded Henderson a windfall has no bearing on Strickler's case or on the principle of Virginia law reaffirmed in his case on direct appeal.

was not "material" under *Bagley*, Strickler can show neither *Brady* error nor the "prejudice" required to excuse his procedural default.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 18 1999
OFFICE OF THE CLERK

No. 98-5864

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TOMMY DAVID STRICKLER,
Petitioner,
v.
FRED W. GREENE, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is no dispute in this case, nor has there ever been, that Leanne Whitlock was brutally murdered in January 1990. There likewise is no doubt of the Commonwealth's compelling interest in bringing Ms. Whitlock's murderer to justice, or of the Commonwealth's interest in the finality of properly obtained and reliable capital judgments. The Commonwealth's emphatic repetition of those propositions adds nothing to the analysis of the questions that this Court directed the parties to brief. What *is* at issue here is whether the capital judgment against *petitioner* can, in fact, be treated as reliable, given the Commonwealth's suppression of evidence that would have devastated the credibility of the Commonwealth's purportedly disinterested "eyewitness," Anne Stoltzfus. The Commonwealth's argument before this Court on *that* issue rests, at bottom, on the proposition that "the law is easy to beat." *Deal v. United States*, 508 U.S. 129, 136 (1993). In the Commonwealth's view, if state prosecutors can misrepresent their compliance with federal constitutional obligations long enough to secure affirmance of a criminal conviction and denial of state collateral review, there is nothing federal courts can do about it.

Indeed, even in this Court, the Commonwealth's defense of its actions evinces a surprisingly lackadaisical approach not only to its constitutional obligations under *Brady*, but also to the most fundamental duties that every litigant owes to the judicial system. Without a hint of embarrassment, the Commonwealth asserts that its factual representations to the state courts, avowing its compliance with *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, "obviously" should *not* be taken to imply that the Commonwealth agents who made those representations actually "had reviewed the Commonwealth's files for possible exculpatory material." Va. Br. 28. Such representations, it seems, are no more than stock assertions that the Commonwealth makes, without inquiry into their accuracy, to ensure the rejection of federal constitutional claims. That

approach to the judicial system, which would be unsettling if suggested by a mere private litigant, scarcely "justif[ies this Court's] trust in the prosecutor as the representative of a sovereignty whose interest * * * is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (internal citations omitted). It is not surprising that neither the United States nor a single State of the Union supports the Commonwealth's arguments in this Court.

In any event, the Commonwealth's attempt to fortify and defend the Fourth Circuit's decision severely misapprehends not only this Court's *Brady* jurisprudence, but also this Court's understanding of the type of "external" impediments to the defense that traditionally have been held to constitute "cause."[1] The Commonwealth would assess the materiality of new evidence that impeaches a particular witness by conclusively presuming that the testimony of all remaining witnesses is the gospel truth, even if (as in the case of Donna Tudor) those other witnesses were themselves subject to devastating impeachment; indeed, the Commonwealth would not even consider evidence "exculpatory" unless the prosecution can articulate *no* theory, however farfetched, under which the evidence might still be consistent with its case. And under the Commonwealth's "heads I win, tails you lose" analysis of procedural default, a prisoner can never show "cause" for failing to raise his *Brady* claim in the state courts: If the prisoner ultimately found the suppressed evidence, that fact alone establishes that he was insufficiently "diligent" in failing to discover his claim sooner. Because the Commonwealth's arguments are wholly unsupportable under this Court's cases, the judgment of the court of appeals must be reversed.

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[1] The Commonwealth does not appear to dispute that, if petitioner's *Brady* claim has merit, he need make no further showing to establish the "prejudice" component of the procedural default inquiry. *See* Va. Br. 32-33 (arguing that petitioner failed to establish the "prejudice" required to excuse his procedural default solely on the basis that petitioner's *Brady* claim lacks merit); *see also* Pet. Br. 46-47.

I. THE COMMONWEALTH CLEARLY VIOLATED *BRADY* AND ITS PROGENY

The Commonwealth's *Brady* argument is premised on the theory that petitioner had access to the "substance" (Va. Br. 36) of the five concededly withheld documents, because the Commonwealth allegedly disclosed to him three other documents—Exhibits 2, 7 and 8. The Commonwealth in fact never has established that Exhibits 2, 7 and 8 were disclosed to petitioner. Indeed, although the Commonwealth misleadingly contends that *petitioner* "himself established" that those exhibits "were in the Commonwealth's Attorney's file prior to trial" (*id.* at 37), the Commonwealth cites to the *prosecutor's* affidavit for that claim. *Ibid.* (citing J.A. 368). Petitioner submitted a contrary affidavit by one his trial counsel, who swore that he "first learned these materials existed * * * in 1997" (J.A. 300), seven years after the trial. Petitioner also submitted an affidavit to the same effect by Henderson's trial counsel, who had ostensibly been given access to the same prosecutor's "open file." *Id.* at 330.[2] The district court expressly adverted to that factual dispute, but it ruled that it was not necessary to resolve it, because petitioner is clearly entitled to relief under *Brady* "even if the three documents that are in dispute were provided to [petitioner's] trial counsel." *Id.* at 392.[3]

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[2] While the affidavit of petitioner's trial counsel refers to "the attached Exhibits 1-7" (J.A. 300), the context makes clear that the omission of Exhibit 8 from that range was a typographical error. The affidavit makes clear that trial counsel was referring to the totality of "Det. Claytor's notes of interviews * * * and letters and notes from Ann Stoltzfus to Det. Claytor." *Ibid.* The district court clearly understood that point. *See id.* at 392 (noting that "Exhibits, 2, 7 and 8" "appear to be genuinely in dispute").

[3] In light of the clarity of the district court's analysis of this issue, it is difficult to understand how the Commonwealth can reasonably represent to this Court that "[t]he district court did not mention exhibits 2, 7 or 8," but "did not take issue" with the Commonwealth's claim "that the defense had access to each of those documents prior to trial." Va. Br. 13. The district court plainly *did* mention those exhibits, making clear the limited pur-

Because the district court merely assumed *arguendo* that those three exhibits were disclosed to the defense, the Commonwealth errs in suggesting that those exhibits require affirmance of the Fourth Circuit's judgment, which ordered the outright *dismissal* of the habeas petition. J.A. 429. If this Court were inclined to agree with the Commonwealth's claim that Exhibits 2, 7 and 8 replicate the five concededly withheld documents, that conclusion would still require vacatur and an evidentiary hearing into whether the Commonwealth in fact produced those three exhibits in its "open file."[4] This Court should not, however, agree with the Commonwealth's strained interpretation of the five withheld documents. Because the district court correctly concluded petitioner is entitled to relief under *Brady* even on the assumption that the defense had access to Exhibits 2, 7 and 8 before the trial, there is no need for any further hearing. The judgment of the court of appeals rejecting petitioner's *Brady* claim should be reversed outright.

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pose for which it accepted the premise that the defense might have had access to them before trial. J.A. 391-92.

[4] The Commonwealth also notes that one of petitioner's trial counsel, Thomas Roberts, submitted to the district court an affidavit, which that court "accepted * * * 'as true' for purposes of * * * summary judgment." Va. Br. 36 & n.16. Roberts' brief affidavit does not, as the Commonwealth asserts, "conclusively establish[] that [petitioner] was aware at the time of trial of the facts contained in the 'Stoltzfus materials.'" *Ibid.* Indeed, the affidavit asserts that Roberts does *not* recall seeing the specific documents at issue here, but merely recalls "the information contained in them." J.A. 371. The affidavit does not identify any specific "information" contained in the Stoltzfus materials that Mr. Roberts purports to recall; it simply recites Mr. Roberts' impression that Stoltzfus' story had become more detailed over time. Not surprisingly, the district court concluded that "[e]ven accepting Roberts' statements as accurate and truthful, they are much too vague and insufficient to create a genuine dispute that Exhibits 1, 3, 4, 5, and 6 of the Stoltzfus materials were disclosed to defense counsel in light of all of the evidence to the contrary." *Id.* at 399-400. The Commonwealth has offered no argument that impugns that analysis.

A. The Five Suppressed Exhibits Were Clearly Exculpatory

The Commonwealth contends that the letters and notes on which petitioner bases his *Brady* claim are not "exculpatory" because they purportedly contain "no per se 'inconsistencies'" (Va. Br. 41 n.22), but merely reflect "minor variations" (*ibid.*) that could easily have a benign explanation. *Id.* at 42. According to the Commonwealth, it is "completely unremarkable that a citizen witness such as Stoltzfus initially expressed some hesitancy," and it would be "neither reasonable nor realistic" to expect her "to say exactly the same thing on each occasion" she discussed the case with the police. *Ibid.* Those arguments evince a profound misunderstanding not only of what types of evidence are deemed "exculpatory" under *Brady* and its progeny, but also of the record in this case.

1. Evidence is "exculpatory" if it is "*favorable* to the accused" (*Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (emphasis added)), a determination that turns on what "competent counsel" could have accomplished with the evidence. *Kyles*, 514 U.S. at 441; *see also United States v. Bagley*, 473 U.S. 667, 676 (1985) (*Brady* inquiry focuses on impact evidence would have "if disclosed and used effectively"). This Court made clear 40 years ago that evidence that impeaches a prosecution witness clearly is "favorable" in the relevant sense, since "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). For that reason, it has long been established that "[i]mpeachment evidence * * * falls within the *Brady* rule." *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154 (1972).[5]

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[5] Because the principles on which petitioner relies were established decades before his trial, there is no substance to the Commonwealth's assertion that petitioner seeks to "expand the scope

According to the Commonwealth, however, impeachment evidence should not be deemed "exculpatory" so long as the prosecution can articulate *some* theory under which the evidence is consistent with the prosecution's case, such as the Commonwealth's suggestion that most civilian witnesses initially give truncated accounts of the facts to the authorities. Va. Br. 42-43. No precedent from this Court supports such a view of *Brady*, and the Commonwealth understandably cites none. Although in the first instance "it is the State that decides which information must be disclosed" (*Ritchie*, 480 U.S. at 59), this Court's *Brady* cases seek "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440. The threshold issue for the prosecutor, therefore, is not whether *he* can put an inculpatory cast on the evidence, but whether competent defense counsel could reasonably use the evidence to suggest to the jury that it should infer bias, confabulation, lack of memory, or any other circumstance that the law of evidence traditionally has regarded as a proper ground for impugning the reliability of testimonial evidence. *Cf. Kyles*, 514 U.S. at 444 (noting that "the evolution over time of a given eyewitness's description can be fatal to its reliability").

The Commonwealth's protestations about what reasonably may be expected from a "citizen witness such as Stoltzfus" (Va. Br. 42) ring particularly hollow in this case, because Stoltzfus chose to deflect all attempts to cast doubt on her story by appealing to her "exceptionally good memory" and by emphasizing how closely she "paid attention" to the events she related at trial. J.A. 58. It was that "exceptionally good memory" that purportedly explained Stoltzfus' remarkable ability to give testimony bordering on videography, including a detailed account of the garments worn by petitioner several months earlier. Having secured petitioner's conviction by relying on Stoltz-

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of *Brady*" in violation of the "new rule" principle of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Va. Br. 42 & n.23.

fus, "exceptional" memory, the Commonwealth is poorly positioned to suggest now that she and her memory were, after all, merely ordinary.

2. Moreover, the Commonwealth's claim that the five concededly suppressed exhibits lacked any exculpatory value beyond that provided by Exhibits 2, 7 and 8 is sheer obfuscation. For example, the Commonwealth contends that there is nothing exculpatory in the fact that Stoltzfus claimed, when she first was approached by Det. Claytor, that she could not identify the black female victim. J.A. 306 (Exh. 1). It reasons that "Whitlock's identity was never an issue at trial * * * and any attempt to 'impeach' Stoltzfus by suggesting that the black woman in the blue car was not Whitlock would have been ludicrous." Va. Br. 38-39 n.19. The Commonwealth also contends that, in any event, Exhibit 7 "establishes the very same thing"—*i.e.*, "that Stoltzfus identified Whitlock days after the crime" after viewing photographs of Ms. Whitlock with the victim's boyfriend. *Id.* at 38.

As the Commonwealth should well know, however, the issue is not whether the jury knew the actual identity of the victim, but whether it knew enough about Stoltzfus' lack of reliability as a percipient witness. A purported "eyewitness" who announces to the police when she is first interviewed (a time when the events presumably are freshest in her mind) that she lacks *any* ability to identify the victim—beyond stating the victim's race and sex—essentially admits that her powers of observation either are limited or were less than fully engaged on the occasion in question (or both). Each of those propositions is incompatible with Stoltzfus' trial claims that her memory is "exceptional" and that she paid close attention to the events she related to the jury, to say nothing of the inconsistency between Stoltzfus' original inability to describe the "black female" and her detailed account of the victim's appearance at trial. J.A. 41-42 ("rich college kid," "beautiful," "well dressed," "did not wear glasses," "she was happy, she was singing"). And contrary to the Commonwealth's assertion, that impeaching information is *not* "the

very same thing" that appears in Exhibit 7, in which Stoltzfus merely reports that she has now placed a name—"LeAnn Whitlock"—on "the black girl" whose abduction Stoltzfus had observed. *See* J.A. 319 ("As soon as I saw John Dean's pictures of LeAnn Whitlock[,] I knew beyond a shadow of a doubt that she was 'the black girl' * * *."); *see also* J.A. 311 (same report in Exh. 2). The latter statement would not "clearly put [defense counsel] on notice" that Stoltzfus' reliability "was open to serious attack." *Kyles*, 514 U.S. at 444 n.14.

That refusal to grapple with the crucial issue—whether Stoltzfus was in fact a reliable witness—is evident in the Commonwealth's entire approach to the purported overlap between the concededly suppressed documents and (the arguably produced) Exhibits 2, 7 and 8. That approach consists of identifying a discrete fact that appears in each set of documents (often in very different formulations), pronouncing the two sets of documents identical on that basis alone, and refusing to discuss the remaining (highly exculpatory) bulk of the withheld documents. Thus, for example, the fact that Exhibits 2 and 8 describe the victim's car as "shiny" and "blue" is sufficient for the Commonwealth to attach no importance to the fact that the suppressed exhibits show how Stoltzfus flip-flopped in her description of that car (from "sports" to "standard boxy American style"), or to the fact that she was merely relaying her "*vague impression*[*s*]" of what she *thought* the car looked like. *Compare* Va. Br. 39 *with* J.A. 311 (Exh. 3); *id.* at 317-18 (Exh. 5).

Similarly, the fact that Exhibit 4 sets a "time line of [Stoltzfus'] January 5[th] journey through the Valley Mall" (Va. Br. 39) is sufficient for the Commonwealth to pronounce that exhibit substantially identical to Exhibit 8 (*ibid.*), despite the wealth of devastating impeachment material that is found in the former but not in the latter. Among other things, Exhibit 4 makes clear that Stoltzfus had initially professed "confusion" about the events of January 5th, that she had not remembered

going inside the mall at all, and that she had thought she had been at the Mall much later, around closing time. J.A. 313, 316 (Exh. 4).[6] In Exhibit 4, Stoltzfus also admits that she has "a very vague memory that [she is] not sure of" (*id.* at 316) concerning the key aspect of her trial testimony: her description of how the blue car was boarded by a "wild guy." In fact, Stoltzfus expressed doubt that the "wild guy" was the same person as a "revved-up mountain man" she had seen earlier. *Ibid.* ("Were those 2 memories the same person?"). And Exhibit 4 also makes clear that many of the "memories" that Stoltzfus recounted at trial were not based on her independent recollection, but were based instead on what she inferred from old cash register receipts and a cancelled check and from her daughter's recollections. *Id.* at 313-14, 317. For that reason, the district court correctly concluded that Exhibit 4 "provides a basis [on] which Stoltzfus's testimony might have been excluded altogether." *Id.* at 389.[7]

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[6] The Commonwealth contends that Stoltzfus' initial "confusion" and lack of memory about being present at the Mall on January 5th are irrelevant, because Stoltzfus "confirmed her presence at the mall * * * at the time of Whitlock's abduction with several cash register receipts and a canceled check." Va. Br. 39-40. Again, that analysis misses the point, because what is important is not whether Stoltzfus ultimately resolved her "confusion" about being there in a manner that is consistent with other evidence, but that she was too addled to remember being there in the first place. The point is significant because the Commonwealth's case depended on the reliability of those aspects of Stoltzfus' testimony that were *not* independently corroborated—*i.e.*, her detailed account of the abduction and her identification of petitioner as the ring leader in that crime. It was therefore essential for the defense to expose Stoltzfus as an unreliable *witness*, even if it was true that other evidence corroborated some of the less important aspects of her testimony. *Cf. Idaho v. Wright*, 497 U.S. 805, 822-23 (1990).

[7] The Commonwealth asserts that the district court's view "is frivolous," and it represents that petitioner "never has challenged the admissibility of [Stoltzfus'] identification" of him. Va. Br. 40 n.20. Here, as elsewhere, the accuracy of the Commonwealth's analysis would benefit from forgoing invective in favor of a more searching review of the record on which its representations are

Finally, the Commonwealth's argument wholly ignores the fact that the five concededly suppressed exhibits cast the three exhibits that purportedly were disclosed in a dramatically different light. Taken together, the eight exhibits compellingly show not only "the evolution over time of [Stoltzfus'] description" (*Kyles*, 514 U.S. at 444), but also how that evolution mirrored, step by step, Det. Claytor's meetings with Stoltzfus; they show a witness who craved Claytor's approval and who appeared willing to shift her recollection to conform her story to what he expected it to be. *See, e.g.*, J.A. 316 ("I'm sorry my initial times were so far off"). Indeed, the eight documents paint a portrait of Stoltzfus that differs markedly from her trial image of a civilian who became, by happenstance, a reluctant participant in the criminal justice process. The jury saw a witness who initially avoided contacting the authorities and whose eventual trial testimony, like her contacts with law enforcement, reflected nothing beyond the discharge of an unpleasant civic duty. By contrast, the full sweep of the Stoltzfus materials reveals someone with a rather obsessive interest in the investigation—someone who, on her own initiative, bombarded law enforcement with her written impressions, and who clearly viewed herself as a member of the prosecution team. It accordingly cannot reasonably be doubted that the suppressed documents, besides contradicting numerous specific aspects of Stoltzfus' trial testimony, also furnished ample grounds for impeaching her for bias. *Cf. United States v. Abel*, 469 U.S. 45, 52 (1984) (noting that proof of bias is "almost always relevant" to a jury's assessment of "the accuracy and truth of a witness' testimony").

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based. Petitioner in fact moved to suppress Stoltzfus' identification testimony immediately after she finished giving it. J.A. 62. The prosecutor defeated that motion by suggesting that under "the totality of the circumstances" Stoltzfus "still had a good impression of the defendant" (*id.* at 63), an argument that presumably was meant to emphasize Stoltzfus' purportedly ample opportunity to observe petitioner at length during the commission of the offense. *Cf. United States v. Wade*, 388 U.S. 218, 241-42 (1967).

B. Stoltzfus' Pre-Trial Statements Were Plainly Material

This Court has emphasized time and again that the materiality standard "is not a sufficiency of evidence test," and, therefore, does not require that the defendant "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. The Commonwealth's principal materiality argument nonetheless reduces to the assertion that the "independent" evidence suffices to convict petitioner, even if Stoltzfus' testimony is disregarded or heavily discounted. Va. Br. 46-49. The Commonwealth also places great emphasis on the fact that petitioner's counsel conceded in summation that petitioner "had abducted and robbed Whitlock," and that petitioner himself admitted, in connection with his capital sentencing proceeding, that he had been present in Whitlock's car and at the murder scene. Those "admissions," the Commonwealth believes, render "immaterial" its own failure to disclose exculpatory materials to the defense. *Id.* at 33-35. Once again, the Commonwealth's analysis is flawed at every turn.

1. The Commonwealth's reweighing of the non-Stoltzfus evidence not only is an impermissible "sufficiency" analysis of materiality, but it is also wrong on its own terms. As noted in the opening brief (Pet. Br. 33-34), without pertinent rebuttal from the Commonwealth, not all parts of a trial record are equally persuasive to a jury. Experience teaches that an in-court identification by an unwavering and purportedly disinterested eyewitness, like a videotape or a signed confession, is overwhelmingly likely to sway juries toward conviction. Because it is well-nigh impossible that any jury would assess the Commonwealth's evidentiary presentation *apart* from Stoltzfus' trial account, there is no evidence in this record that can fairly be said to be "independent" of that account.[8]

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[8] Indeed, the prosecutor told the jury that Stoltzfus' testimony "really [could] not be disputed beyond any doubt," and emphasized

Moreover, the Commonwealth's submission is deeply flawed because its claim that the evidence against petitioner is "overwhelming" improperly assumes that the trial testimony of all prosecution witnesses other than Stoltzfus was truthful and reliable.[9] The Commonwealth goes so far as to assert that Donna Tudor's assertions are "undisputed." Va. Br. 46; *see also id.* at 48-49. *Brady* claims, however, "must be evaluated in the context of the entire record" (*United States v. Agurs*, 427 U.S. 97, 112 (1976)), including those parts of the record that impeach the testimony of other prosecution witnesses. *Kyles*, 514 U.S. at 445. Donna Tudor's trial testimony was subject to withering impeachment, because she had originally been arrested for the theft of the victim's car and had also been found in possession of the victim's earrings; only then did she allege that petitioner had made incriminating statements in connection with the Whitlock killing. Not only was Tudor testifying to deflect suspicion for the murder away from herself and to curry favor with the prosecution, but she had earlier admitted to her husband that she had indeed been present at the time Ms. Whitlock was killed and that petitioner was innocent of the killing. *See* Pet. Br. 9-10 & n.6. Given that the opening brief emphasized Tudor's obvious lack of reliability (*id.* at 9-10, 34), the Commonwealth's decision

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that "[i]t was the last time Leanne was seen alive by anybody." J.A. 165, 170. He similarly relied on Stoltzfus' claims at sentencing to urge a death sentence on the basis of petitioner's role as "the aggressor. He was the one that ran out. He was the one that grabbed Leanne Whitlock. When she struggled trying to get away from him in Harrisonburg, he was the one that started beating her there in the car. And finally subdued her enough to make her drive away from the mall * * *." Sent. Tr. 15.

[9] Thus, for example, the Commonwealth notes that Kurt Massie saw petitioner "at 7:30 p.m. as he drove [the victim's] car into the field in which Whitlock was murdered." Va. Br. 46. The Commonwealth neglects to note that it was dark, that Massie saw only three people in the car, and that all the occupants of the car Massie observed were *white*. *Compare* Pet. Br. 8.

to premise its materiality analysis on the purportedly "undisputed" truth of her assertions is unfathomable.

Similarly inexplicable is the Commonwealth's apparent belief that the materiality issue before this Court should turn on the fact that the Virginia courts "found as a matter of historical fact" that petitioner killed Ms. Whitlock "in the commission of robbery *while armed with a deadly weapon*." Va. Br. 48 (citing former 28 U.S.C. 2254(d) (emphasis in original)). Even leaving aside the *legal* character of the materiality determination under *Brady*, no state court ever has held a hearing on petitioner's *Brady* claim and thus there are no "findings" entitled to deference under former Section 2254(d). *See Kimmelman v. Morrison*, 477 U.S. 365, 389 (1986) (no deference due when "[t]he issue * * * place[d] before the federal habeas courts is substantially different from the issue * * * presented to the [state] judge"); *see also Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995) ("mixed questions" are beyond the purview of former Section 2254(d)). Moreover, the Sixth Amendment entitles petitioner to a trial *by jury*, not to an appellate determination of guilt. The jury that heard petitioner's case was told that it could convict him of capital murder on the basis of the "abduction" and "robbery" predicates, both of which were equally dependent on Stoltzfus' testimony. No jury that believed Stoltzfus had been coached to lie about petitioner's role in the abduction, and which rejected her account on that basis, would go on to find that petitioner nonetheless somehow robbed Whitlock, much less that he murdered her.

2. There is no greater merit to the Commonwealth's claim that its suppression of exculpatory evidence was rendered immaterial by "admissions" that petitioner's counsel made to the jury and that petitioner himself made at sentencing. "Of course," the statements petitioner made, after verdict, solely in connection with his impending sentencing, "could [not] possibly have affected the jury's appraisal * * * at the time of [his] trial[]."

Kyles, 514 U.S. at 450 n.19. But in any event, both sets of statements—whether by petitioner or his counsel—are properly viewed as part and parcel of the Commonwealth's violation of *Brady*, rather than as the means by which the Commonwealth can escape the consequences of that violation.

Because this Court borrowed the *Brady/Bagley* materiality standard from the "prejudice" prong of the Sixth Amendment's test for ineffective assistance of counsel, *see Kyles*, 514 U.S. at 434 (noting that Court "adopt[ed] formulation announced in *Strickland v. Washington*, 466 U.S. 668, 694 (1984)"), this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985), is particularly instructive. In *Hill*, the habeas petitioner sought to invalidate his plea of guilty on the ground that he had received ineffective assistance from his counsel in the proceedings leading to that plea. *Id.* at 54-55. Based on the argument advanced by the Commonwealth here, the answer to the claim in *Hill* would seem easy—*i.e.*, even if the attorney was incompetent, the defendant could not show "prejudice" because he himself "admitted" his guilt in open court by entering the plea. The Court, of course, did not follow that course. Speaking through then-Justice Rehnquist, the Court held instead that a habeas petitioner could secure relief if counsel's incompetence "affected the outcome of the plea process." *Id.* at 59. In particular, the Court interpreted *Strickland* to provide for relief if there is a reasonable probability that, absent counsel's deficient performance, the defendant "would not have pleaded guilty and would have insisted on going to trial." *Ibid.*[10]

[10] While amicus Criminal Justice Foundation urges this Court to decide this case on the basis of the standards that prevail in the *Strickland* context (CJF Br. 18-20), amicus inexplicably fails to cite, much less discuss, this Court's decision in *Hill*, which would seem to present the most apt analogy. The cases on which amicus relies—*Nix v. Whiteside*, 475 U.S. 157 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993)—merely hold that a criminal defendant is not entitled to a trial advantage that violates the law. Unlike the defendants in *Nix* and *Fretwell*, petitioner does not seek "the luck of a lawless decisionmaker" (*Fretwell*, 506 U.S. at 370), but instead the judgment of an *informed* one.

That analysis is consistent with the general rule that the government may not reap the benefits of its own failure to observe constitutional commands (*e.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963) ("fruit of the poisonous tree" doctrine)), and it answers the Commonwealth's claim here. There can be no doubt that the Commonwealth's suppression of exculpatory evidence, and defense counsel's inability to impeach Stoltzfus' gripping account, produced counsel's tactical decision to concede petitioner's guilt on counts carrying a sentence other than death. Indeed, the Sixth Amendment *required* counsel to consider the wisdom of such a "tactical retreat" once it became clear that Stoltzfus' testimony was essentially unimpeachable. *United States v. Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (Breyer, J.) (noting that such concessions in the face of adversity "are deemed to be effective assistance"); *see also Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991) (Posner, J.) (counsel may make such tactical concessions even if client has not consented to them). It is equally clear that, had the Commonwealth not suppressed the Stoltzfus materials, petitioner could well have been acquitted; and he certainly would not have corroborated with his own statements any part of Stoltzfus' discredited account. In these circumstances such "admissions" cannot render "immaterial" the Commonwealth's suppression of exculpatory evidence.

3. No different conclusion is warranted by the Commonwealth's assertion that the evidence is not "material" in light of the Commonwealth's purported right to introduce petitioner's "admissions" "at any retrial." Va. Br. 34. While the Commonwealth cites *Wood v. Bartholomew*, 516 U.S. 1 (1995), as the source of that purported right, the passage on which the Commonwealth relies is actually dictum, and weak dictum at that. The *holding* of the case was that the "suppressed" evidence was not mate-

rial even *without* considering new testimony "that the State likely could introduce on retrial." *Id.* at 8.[11] In any event, the Commonwealth is wrong to suppose that the materiality calculus would shift in its favor if the analysis were focused on a hypothetical retrial at which petitioner's "admissions" were part of the evidentiary mix.

To begin with, petitioner quite emphatically "denie[d] murdering, abducting, much less robbing Leanne Whitlock." Pre-Sentence Report 2C. He never "admitted" his *guilt* of the offenses, as the Commonwealth implies, but merely acknowledged in his sentencing proceedings that he rode in the blue car with Henderson and Ms. Whitlock, who appeared to know each other, and that he was nearby when Henderson killed her. *Id.* at 2B; Sent. Tr. 54-55.[12] While those statements would add to the Commonwealth's circumstantial case, they would also be subject to a compelling objection based on their lack of voluntariness. *Jackson v. Denno*, 378 U.S. 368 (1964). Even if the statements were admitted, petitioner would

[11] The Court gave no hint that its summary disposition in *Wood* was intended to change the traditional understanding that "[l]ogically the same [materiality] standard must apply" to the prosecutor's pre-trial assessment of whether disclosure is required and to the court's post-trial decision of whether failure to disclose particular information deprived the defendant of due process. *Agurs*, 427 U.S. at 108. Indeed, under the Commonwealth's view of the law, prosecutors would have untoward incentives to suppress exculpatory evidence in cases in which the materiality question is close, in the hope that additional evidence of guilt will have surfaced by the time, if ever, when the materiality issue is litigated. Far from discouraging prosecutors from "tacking too close to the wind," *Kyles*, 514 U.S. at 439, that approach would invite them to fly in the face of it.

[12] For that reason, amicus Criminal Justice Foundation is wrong to premise its entire analysis of this case on the theory that "we know" that petitioner "is guilty." CJF Br. 20. In fact, the bulk of amicus' submission is devoted to the proposition that the Court should "tighten[]" (CFJ Br. 14) the availability of habeas relief, a position not briefed by the real party in interest and thus "not properly before this Court." *Reno v. Koray*, 515 U.S. 50, 55-56 n.2 (1995).

have an absolute right to place before the jury all evidence relevant to their voluntariness, *Crane v. Kentucky*, 476 U.S. 683, 688-90 (1986), including the fact that he is a man of "borderline" intelligence—"four points above mental retardation," Sent. Tr. 42—who was facing death as a result of the Commonwealth's misconduct in suppressing evidence that could have exculpated him. A jury could certainly conclude that the "admissions" were not a product of free will, but a desperate ploy to avoid pointlessly antagonizing the sentencer, who was already persuaded that Stoltzfus' account was unimpeachable.

A new jury would also consider the Stoltzfus materials, which would allow petitioner not merely to expose Stoltzfus' earlier account as the result of coaching and confabulation, but also to "attack[] the reliability of the investigation" (*Kyles*, 514 U.S. at 446), including the testimony of other witnesses (*id.* at 445), on that basis. And, of course, the Commonwealth would not be the only party entitled to introduce new evidence. Petitioner could also rely on additional evidence that has more recently come to light. In particular, it now appears that Donna Tudor, in a 1994 letter to her husband, admitted committing perjury at petitioner's original trial.[13] It is impossible to escape the conclusion that the Commonwealth's suppression of exculpatory evidence must be deemed "material" under *any* analysis that this Court conceivably might apply.

II. PETITIONER CLEARLY ESTABLISHED "CAUSE" FOR FAILING TO PRESENT HIS *BRADY* CLAIM TO THE STATE COURTS

The Commonwealth chides petitioner for "devot[ing] an inordinate amount of his brief" to showing that the

[13] In her June 1994 letter to her husband, Donna Tudor stated: "You was right I lied in court on Strickler but I had to. I know he only tryed to save the girl." For the Court's convenience, three photographs of Donna Tudor's letter and copies of an expert report commissioned by the defense to assess the letter's authenticity have been lodged with the Clerk.

Commonwealth's misrepresentations about its "open file" policy precluded petitioner from raising his *Brady* claim at trial or on direct review. Va. Br. 17-18 n.6. According to the Commonwealth, the only relevant "default" for which petitioner must show "cause" is his failure to raise a *Brady* claim during state *habeas* review. *Id.* at 20 n.8. The Commonwealth believes that petitioner cannot make that showing because the Commonwealth's misrepresentations about compliance with *Brady* occurred "after" petitioner filed his initial habeas pleadings and, therefore, "could not have had any impact on petitioner's failure to raise a *Brady* claim in his petition as he was required to do under state law." *Id.* at 19, 28-32. Alternatively, the Commonwealth contends that petitioner was insufficiently diligent in failing to investigate the possibility of a *Brady* violation and in not seeking discovery in state habeas. Those assertions are utterly meritless.

1. The Commonwealth's attempt to carve up its misconduct into neat, separate compartments does not withstand even cursory scrutiny. Beginning with the trial, the Commonwealth engaged in a single, continuous course of misconduct by inviting petitioner's reliance on the purported discharge of the Commonwealth's constitutional duties through the woefully incomplete "open file." The representation conveyed by the "open file"—that the prosecution had properly discharged its *Brady* duties—was never withdrawn; to the contrary, it was renewed on appeal, and it was expressly reaffirmed in pleadings that the Commonwealth filed in response to petitioner's state habeas petition after petitioner sought state habeas relief. The Commonwealth's argument that the last representation of the series could not, by itself, have caused petitioner's omission of the *Brady* claim from his state habeas petition is as irrelevant as it is disingenuous.[14]

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[14] Indeed, the Commonwealth's analysis fails on its own terms. If petitioner had been granted a hearing and discovery on the very ineffective assistance claim to which the misrepresentation was directed (which was predicated on trial counsel's failure to file a *Brady* motion), the Stoltzfus documents likely would have surfaced. Petitioner then could have moved to amend his state habeas petition to add a *Brady* claim.

2. Equally untenable is the Commonwealth's claim that petitioner was duty-bound to disbelieve the Commonwealth's consistent assurances, and continue "diligently" to investigate whether the Commonwealth might, after all, be lying. The Commonwealth has not explained, nor is it apparent, why petitioner could not reasonably rely on the well settled presumption "that public officials have 'properly discharged their official duties.'" *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (citations omitted). As this Court recently noted, that presumption is dispelled only when there is "clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). That standard is scarcely met by the Commonwealth's view that petitioner's suspicions should have been aroused by a close reading of a newspaper's "letter to the editor"—which petitioner *never* saw before the federal proceedings—in which Stoltzfus credited Claytor for her "coherent" trial testimony. Va. Br. 23 (citing J.A. 250).

Indeed, while the Commonwealth seems to believe that petitioner should be charged with actual knowledge of every conceivably relevant fact in the public record—including every inch of the daily newspapers—its view in that regard is clearly foreclosed by *Amadeo v. Zant*, 486 U.S. 214 (1987). In *Amadeo*, the key document that alerted the defendant to his claim was found by sheer happenstance in public court records, where it evidently had rested since its creation. That fact, of course, did not keep this Court from endorsing the district court's view that the document "was concealed by county officials and therefore was not *reasonably* available to petitioner's lawyers." *Id.* at 223 (emphasis added). There is no reason for a different rule of law here, where there is no basis for disputing petitioner's claim that he reasonably relied on the Commonwealth's misleading representations.[15]

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[15] *McCleskey v. Zant*, 499 U.S. 467 (1991), on which the Commonwealth extensively relies (Va. Br. 20-22), is completely inapposite here. As the Commonwealth itself recognizes, the defend-

3. Finally, while the Commonwealth concedes that petitioner had no entitlement to any discovery in state habeas (Va. Br. 24), it asserts that the same facts that alerted petitioner to the need for *Brady* discovery in federal court should have caused him to seek the same relief earlier, and to assert his *Brady* claim, in the state habeas proceedings. *Id.* at 26. That argument fails because petitioner never alleged in federal court that he had any "good cause" for inquiring into potential *Brady* violations. Instead, petitioner's counsel sought, and was granted by the district court, an omnibus authorization to examine all public files relating in any manner to petitioner. *See* Record, Sealed Pleading No. 20 (Feb. 12, 1996). While petitioner quite likely received discovery for which he was not legally eligible, that merely confirms that, like the defendant in *Amadeo*, he discovered the basis for his federal claim by sheer fortuity.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

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ant in *McCleskey* actually *raised* his federal claim in state habeas, dropped the claim in his first federal habeas petition, and then attempted to resurrect it in a successive federal petition. *Id.* at 20-21. Those facts left no doubt that the defendant had clearly been aware of his claim all along.

Respectfully submitted,

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February 1999

MOTION FILED

DEC 9 1998

No. 98-5864

In The Supreme Court of the United States

OCTOBER TERM 1998

TOMMY DAVID STRICKLER,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS, VIRGINIA TRIAL LAWYERS ASSOCIATION, AND VIRGINIA CAPITAL CASE CLEARINGHOUSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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38 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The National Association of Criminal Defense Attorneys (NACDL), the Virginia College of Criminal Defense Attorneys (VCCDA, the Virginia Trial Lawyers Association (VTLA) and the Virginia Capital Case Clearninghouse, a Special Project of Washington & Lee University School of Law (VCCC), by counsel, respectfully request leave, pursuant to Rule 37.3.(b) of this Court, to file this Brief as Amici Curiae in support of the Petitioner in the above-styled action. The Petitioner has consented to the filing of the Brief and the Respondent has withheld consent. The letter from counsel for Petitioner has been filed with the Court.

NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice.

VCCDA is recognized by NACDL as its Virginia state affiliate. VCCDA is a statewide, non-profit organization of approximately 416 criminal defense practitioners. Its purpose is to enhance the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, it provides direct services to its members when they face important issues implicating the

fundamental fairness of the criminal justice system, including litigation advice and support, research and the filing of amicus briefs.

VTLA is non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its interest sections a Criminal Law Section. Its members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

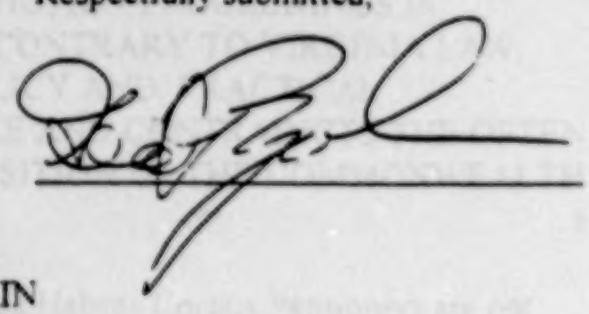
Members of NACDL, VCCDA and VTLA are regularly appointed by the courts of the Commonwealth and the United States to represent capital and other defendants, and to represent inmates in habeas corpus proceedings.

VCCC is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal: making the right to effective assistance of counsel meaningful in Virginia capital cases. It has existed since 1988, assisting defense counsel at all stages of litigation in hundreds of cases. That experience has provided an excellent vantage point from which to assess the issues now before this Court.

Amici recognize that the non-disclosure of material exculpatory evidence by the State is a major impediment to meaningful adversarial testing of the prosecution's case in Virginia. The creative employment of procedural bars, such as the one at issue in this case, to avoid remedying non-disclosure exacerbates the problem of such non-disclosure and contributes to the sporting nature of life and death litigation. In addition, the Fourth Circuit's interpretation and application of the so-called "due diligence" exception to the constitutional duty of the State to disclose exculpatory evidence eviscerates that constitutional right in the Commonwealth. Being committed to the constitutional rights of all criminal defendants and to the need for defendants to be able to vindicate those rights in both the courts of the Commonwealth and the United States, *Amici* believe that the decision in this case must be overturned.

No counsel for any party to this case authored the proposed brief in whole or in part, and no person or entity other than NACDL, VCCDA, VTLA or VCCC and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

Respectfully submitted,



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INTEREST OF *AMICI CURIAE*

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NACDL, VCCDA, VTLA or VCCC and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

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The brief of *Amici* does not address every point argued by the parties. For example, Amici do not address the arguments of the parties as to the materiality of the suppressed evidence. *Amici* concentrate instead on two issues which may

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[2] The program statement of purpose reads: "The Virginia Capital Case Clearinghouse is not about theoretical or philosophical support for or opposition to the death penalty. Rather, it is about commitment to the principle that one who stands to forfeit his life is entitled to the effective assistance of counsel, both for his sake and for the sake of those who would take that life."

assist the Court -- Virginia law, public policy and practice related to discovery in criminal and post-conviction cases and the Fourth Circuit's interpretation and application of its "due diligence" exception to the duty to disclose exculpatory evidence.[3]

SUMMARY OF ARGUMENT

The Fourth Circuit predicated its finding that Petitioner had defaulted his Brady claim on a theory never advanced by Respondent -- indeed, on a theory that is entirely inconsistent with Virginia law, public policy and practice. Contrary to the assumption of the Court of Appeals, the investigatory files of the prosecution and law enforcement agents are not subject to discovery during habeas corpus proceedings in Virginia. In post-conviction, discovery is narrower, not broader, than at trial, and, at trial, such information is not discoverable. Indeed, such information is *privileged* in Virginia, as the Virginia Attorney General has opined in formal opinions and has successfully argued in numerous capital post-conviction cases. Moreover, in the context of claims of non-disclosure of exculpatory evidence, declarations by prosecutors that no exculpatory evidence exists, or that all such evidence has been disclosed, are *final*, whether at trial or thereafter, and preclude discovery, absent detailed factual allegations in the petition as to the evidence not disclosed. In short, discovery is not available in Virginia to enable a habeas corpus petitioner to investigate potential claims, regardless of the suspicions of

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3 *Amici* adopt the Petitioner's Statement of Facts. Copies of the unpublished court records referred to in this Brief have been collected by counsel for *Amici* and will be provided upon request to the Court or parties.

counsel, but only, under extremely limited circumstances, to facilitate proof of a claim *after* an evidentiary hearing has been granted.

In addition to being wrong regarding Virginia post-conviction practice, the Fourth Circuit has been dangerously wrong about the Brady doctrine. In its recent decisions on the subject, the Fourth Circuit has developed a unique interpretation of the so-called "due diligence" exception to the duty of the State to disclose exculpatory evidence. While two Courts of Appeals have refused to recognize such an exception and two others have limited it to the prevention of "blatant gamesmanship" by defense counsel, the remaining Courts of Appeals have applied the exception only where the evidence at issue was readily available to the defense. On the other hand, the Fourth Circuit has applied the exception whenever the Court can hypothesize a means by which the defense *could have* discovered the evidence itself, regardless of its actual. Consequently, the exception has swallowed the rule in the Fourth Circuit, eliminating any incentive for prosecutors to disclose such evidence.

ARGUMENT

The Fourth Circuit's judgment was erroneous on two grounds which *Amici* address here: (1) its conclusion that exculpatory information in the files of the prosecutor and law enforcement agents is subject to discovery is entirely inconsistent with Virginia law, public policy and practice, and (2) its unique interpretation of the so-called "due diligence" exception to the constitutional requirement that exculpatory evidence known to the prosecution be disclosed, threatens the continuing vitality of the duty to disclose. For these reasons, the decision must be reversed.

I. THE COURT OF APPEALS' ASSUMPTION THAT THE FILES OF PROSECUTORS AND LAW ENFORCEMENT AGENCIES IN VIRGINIA ARE READILY SUBJECT TO DISCOVERY IN STATE POST-CONVICTION PROCEEDINGS IS DIRECTLY CONTRARY TO VIRGINIA LAW, PUBLIC POLICY AND PRACTICAL EXPERIENCE AND CONTRADICTS THE OFTEN STATED POSITION OF THE COMMONWEALTH ITSELF

In finding that Petitioner was procedurally barred from pursuing his due process claim under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the Court of Appeals fashioned from whole cloth the notion that habeas corpus petitioners in Virginia are entitled to broad discovery, even as to claims for which the petitioner does not yet have evidentiary support. Indeed, before the Court of Appeals reached that conclusion, Respondent had never even suggested that Strickler would have been entitled in state court to subpoena the police file.

Under these circumstances, no habeas petitioner in Virginia could have obtained police files through discovery. At trial, the Commonwealth had represented that it had made *all* its evidence available to the defense through an "open file." In response to an ineffective assistance of counsel claim in the state habeas proceedings, the State denied the existence of any undisclosed exculpatory evidence, attesting that it had provided all the Commonwealth's exculpatory evidence through the prosecution's "open file."

A. Virginia Habeas Corpus Petitioners are not Afforded Discovery to Investigate Possible Claims

The suggestion by the Court of Appeals that a Virginia habeas corpus petitioner who does not already know the factual basis of his claim can simply subpoena the contents of the police file is fanciful at best. First, a claim lacking factual details would be summarily dismissed as a conclusory pleading, even if the petitioner has no way to know the facts in the possession of the Commonwealth's agents. *See* Fitzgerald v. Bass, 6 Va.App. 38, 44, 366 S.E.2d 615, 618 (1988)(en banc) (*citing*, Penn v. Smyth, 188 Va. 367, 370-1, 49 S.E.2d 600, 601 (1948), *cert. denied*, Fitzgerald v. Thompson, 493 U.S. 945 (1989).

Moreover, even if summary dismissal could be avoided, discovery in habeas cases is extremely limited. The applicable rule of court provides that discovery is allowed only "with leave of the court" and that the court "may deny or limit discovery...." Va. Sup. Ct. Rule 4:1(b)(5). A showing of "good cause" is a prerequisite to obtaining discovery. *See* Rakes v. Fulcher, 210 Va. 542, 547, 172 S.E.2d 751, 756 (1970) (holding that discovery is available only upon demonstration of substantial need for the material). Thus, claim can not survive summary dismissal, and the petitioner can not obtain discovery, unless he can at least set forth the details of the exculpatory information that exists and is sought. White v. Commonwealth, 12 Va.App. 99, 102, 402 S.E.2d 692, 694 (1991).[4]

While White involved a motion made at the trial level rather than in post-conviction, discovery is more restrictive in habeas corpus, not less, as the Commonwealth has consistently argued.

B. Under Virginia Law, The Work Product of Attorneys for the Commonwealth and Their Agents is Privileged. Its Disclosure Would Violate Virginia's Strong Public Policy and the Respondent's Consistent Position is that It is not Discoverable.

Where, as here, the information sought is the work product of the attorney for the Commonwealth or law enforcement agents, Virginia courts are particularly vigilant in limiting the petitioner's access. *See, e.g.*, Rosser v. Commonwealth, 24 Va. App. 308, 316, 482 S.E.2d 83, 87 (1997) (initial report of investigating officer not discoverable)(*citing*, Ramirez v. Commonwealth, 20 Va.App. 292, 296-7, 456 S.E.2d 551, 553 (1995)) and Va. Sup. Ct. Rule 3A:11(b)(2)); *see also* Va. Sup. Ct. Rule 4:1(b)(3)(work product of attorney's agents not discoverable absent showing of substantial need)

E.g., Warden's Opposition to Motion for Leave to Invoke Discovery in Goins v. Netherland, Record No. 962477 (Va.S.Ct. 1997)(Petitioner not entitled to more discovery than at criminal trial) App. 3; Director's Opposition to . . . Motion for Order to Release Files and Motions for Discovery in M.D. Williams v. Angelone, Record No. 970491 (Va.S.Ct. 1997) ("...Williams is not entitled to most of the requested items because he was not entitled to them even when he was a criminal defendant in a criminal proceeding. *See* Rule 3A:11; Strickler v. Commonwealth, [241 Va. 482], 404 S.E.2d 227, 233, [] *cert. denied* 502 U.S. 944 (1991)"); Opposition to Petitioner's Motion for Discovery in Yeatts v. Murray (Cir.Ct. Pittsylvania Co. 1993) (". . .because Yeatts was not entitled to such information at his criminal trial, there is no basis for discovery of this information in collateral proceedings").

Indeed, at every judicial and legislative turn, Virginia has opted for the non-disclosure of the work product of the prosecutorial team. The General Assembly has maintained the privilege for such documents by exempting all criminal investigatory material from the disclosure requirements of Virginia's Freedom of Information Act, *even after the conclusion of the prosecution.*[5] Va. Code § 2.1-342(b)(1). *See*, 1980-81 Va. Op. Atty. Gen. 141, 1981 WL 141051 at *3 (Va.A.G.) For its part, "the Supreme Court of Virginia [has] reaffirmed the *confidentiality* of police investigative reports ...." Id., 1981 WL 141051 at *3 (emphasis added). Consequently, the Attorney General has concluded "that it would be *contrary to public policy* and the sound administration of justice for any court routinely to order the prosecution in criminal cases to turn over its files to defense attorneys." Id. (Emphasis added). Similarly, the Attorney General has concluded that, because of the strong public policy against disclosure, it is the province of the prosecutor, not the police officer, to determine whether the officer's notes should be disclosed to the defense. 1997 WL 174144 (Va. A.G.) That policy is so strong that, in one habeas case, Fisher v. Murray, CL-89006620-00 (Cir. Ct. Bedford Co.) the Attorney General sought to have the petitioner sanctioned for even requesting police files under FOIA.

Not surprisingly, the Attorney General has consistently

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[5] As recently as 1996, the Virginia General Assembly rejected an attempt to amend this provision of the FOIA by allowing for the release of such material following the conclusion of the trial and direct appeal in a criminal case. House Bill 974. *See*, http://legis.state.va.us/cgi-bin/legp.504

argued that such documents are privileged [6] And, under the Rules of Court, *privileged documents are exempt from discovery in state habeas proceedings*. Va. Sup. Ct. Rule 4:1(b)(5).

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[6] *See, e.g.*, Respondent's Response to Motion to Conduct Discovery in King v. Murray, No. CL93000211 (Cir.Ct. Roanoke Co. 1993) ("The requested materials, including the Commonwealth's files and records and the files and records of the named law enforcement officers are privileged matters, not discoverable by the petitioner."); Respondent's Objection to Petitioner's Motion for Leave to File a Request for the Issuance of a Subpoena Duces Tecum...in T. Williams v. Thompson, No. LP 88-81 (Cir.Ct. City of Danville 1989) ("When one considers the legislative intent expressed in the Freedom of Information Act, the Supreme Court of Virginia's intent expressed in the criminal rules, and the case law from across the country, reasons compels the conclusion that the criminal investigative files of the Commonwealth, fall within the meaning of the word "privileged" as used in Rule 4:1(b)(5)"); Respondent's Memorandum in Opposition to Petitioner's Motion for Leave to Conduct Discovery from the Commonwealth in Correll v. Thompson, No. 87-04-1787 (Cir.Ct. Franklin Co. 1987). ("It would be a bizarre result indeed to hold that a criminal defendant, whose freedom hangs in the balance, is precluded under Rule 3A:14 from obtaining criminal investigative files, but the policy reasons underlying the rule somehow dissipate to allow the same individual to gain access to the same files by filing a civil habeas corpus action. The Supreme Court of Virginia, in promulgating the rules, never intended such an anomalous result"); Response to Petitioner's Motion for Leave to Conduct Discovery in Beaver v. Thompson, No. 88-13 (Cir.Ct. Prince George Co. 1988)(same).

Consistent with that public policy, and contrary to the federal rule, *see*, Jencks v. United States, 353 U.S. 657 (1957), among others, Virginia has also refused to require prosecutors to make the statements of its witnesses available to the defense even *after* they have testified. Bellfield v. Commonwealth, 215 Va. 303, 306-7, 208 S.E.2d 771, 774 (1974), *cert. denied*, 420 U.S. 963 (1975). In so holding, the Virginia Supreme Court concluded that the rule of Jencks would be inconsistent with "the same policy of fundamental fairness in protecting the ability of the Commonwealth to prosecute, which we recognized in our earlier cases and led to the adoption of [Va. Sup. Ct.] Rule 3A:14...." Bellfield, 215 Va. at 307, 208 S.E.2d at 774. *See also* Abdell v. Commonwealth, 173 Va. 458, 472, 2 S.E.2d 293, 298-99 (1939) (a rule allowing pretrial disclosure of the Commonwealth's evidence would "tend to subject the attorney for the Commonwealth to great annoyance, lead to the probable destruction or loss of material evidence.... Such a rule...would ...subvert the whole system of criminal law").[7] Indeed, it does not even require disclosure of the names of the Commonwealth's witnesses prior to their taking the stand. *See, e.g.*, Watkins v. Commonwealth, 229 Va. 469, 479, 331 S.E.2d 422, 430-31 (1985), *cert. denied*, 475 U.S. 1099 (1986).

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[7] Nor is the privilege for investigatory information limited to criminal litigation. *See*, 1980-81 Va. Op. Atty. Gen. 141, 1981 WL 141051 at *2 (noting that, in In re: Comm. of Va. Dept. Of State Police, Record No. 781249 (Va. Sup. Ct. 1978), the Court, at the behest of the Attorney General, issued a writ of prohibition barring a trial court from enforcing its order in a civil case directing the State Police to disclose the results of its related investigation).

Not only the law, but also the lesson of practical experience in Virginia belies the theory of discovery asserted by the Court of Appeals. For example, since exclusive original jurisdiction over capital habeas corpus cases was vested in the Virginia Supreme Court in 1995, *see*, Va. Code § 8.01-654(c)(1), that court has denied discovery in each of the twelve cases in which it has been requested.[8]

It is hardly surprising, therefore, that the theory advanced by the Court of Appeals was not advanced by Respondent himself. The Commonwealth, represented by the Attorney General, has consistently and successfully argued that, where the petitioner has not already alleged sufficient facts to state a constitutional claim, he is not entitled to discovery to enable him to investigate potential claims, no matter how suspicious of prosecutorial misconduct he may be.[9] Consequently, in each of

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[8] The last grant of discovery was in 1992, in Payne v. Thompson, (Cir.Ct. Powhatan Co. 1990).

[9] *See, e.g.*, Respondent's Response to Motion to Conduct Discovery in King v. Murray, No. CL93000211 (Cir.Ct. Roanoke Co. 1993) ("Petitioner's speculations are insufficient basis for discovery of the prosecutor and police files"); Warden's Opposition to Motion for Leave to Invoke Discovery in Goins v. Netherland, Record No. 962477 (Va.S.Ct. 1997)(Petitioner not entitled to discovery because Brady claims are "speculative" and petitioner cannot show he is entitled to relief based on his petition); Opposition to Petitioner's Request for Subpoena Duces Tecum in Stewart v. Angelone, Record No. 952042 (Va.S.Ct. 1996)(Petitioner not entitled to his own medical records from pre-trial incarceration as he has failed to produce evidence in habeas petition showing he was not

the habeas corpus cases in which discovery of any kind has been granted, an evidentiary hearing had already been ordered.[10] *See, also*, Rakes, 210 Va. at 546, 172 S.E.2d at 755 ("The mere assertion ... that discovery is necessary for a movant to investigate fully and prepare his case is clearly insufficient as a statement of good cause...").

Counsel's suspicions that exculpatory evidence exists simply do not legally suffice in Virginia to justify discovery of the work product of the prosecutor or law enforcement agents. *See*, Rakes, 210 Va. at 517, 172 S.E.2d at 756; Hughes v.

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competent at the time of trial); Respondent's argument on petitioner's discovery motions in Mueller v. Murray, No. CL94-HC-550 (Cir.Ct. Chesterfield Co. 1995)("The petitioner seems to suggest that, well, I need to have discovery and I need to have a plenary hearing and we will see if there is any validity to my claims. This is putting the cart before the horse. The pleadings, based on the record [,] case law, et cetera have to be cognizable in and of themselves — you normally don't have discovery [in habeas cases]."

[10] *See*, Fitzgerald v. Bass, (Cir.Ct. Chesterfield Co. 1984); Fisher v. Murray, CL-89006620-00 (Cir. Ct. Bedford Co.); O'Dell v. Thompson, CL89-1475 (Cir.Ct. City of Virginia Beach 1990); T. Williams v. Thompson, No. LP 88-81 (Cir.Ct. City of Danville 1989); Payne v. Thompson, (Cir.Ct. Powhatan Co. 1990); Pruett v. Thompson, CL87-2070 (Cir.Ct. City of Virginia Beach 1988); Evans v. Mitchell, No. 7371 (Cir.Ct. City of Alexandria 1986); Jones v. Blair, No. L-3652 (Cir.Ct. York Co. 1985); Clark v. Morris, No. 50768 (Cir.Ct. Fairfax Co. 1982).

Commonwealth. 18 Va.App. 510, 526, 446 S.E.2d 451, 461 (1994)(en banc); Ramdass v. Commonwealth, 246 Va. 413, 420-21, 437 S.E.2d 566, 570-71 (1993), *rev'd. on other grounds*, 512 U.S. 1217 (1994). *See also* Howard v. Warden, 232 Va. 16, 17, 348 S.E.2d 211, 212 (1986) (noting circuit court decision that police files are privileged and not open for examination even when state habeas petition alleges Brady violation and petitioner moves for discovery). Thus, Strickler, who did not know the facts necessary to plead a specific Brady claim, could not have obtained discovery of undisclosed police files.

Finally, there is no support for the suggestion that a habeas petitioner in Virginia can obtain access to police investigatory files by making an informal "request" for exculpatory evidence during the state habeas proceedings. The Commonwealth simply does not recognize the existence of a continuing post-trial duty to disclose exculpatory evidence. *E.g.*, Director's Opposition to Renewed Motion for Expert Services, Motion to Amend, Motions for Order to Release Files, and Motion for Discovery in M.D. Williams v. Angelone, Record No. 970491 (Va.Sup.Ct. 1997) ("The "exculpatory evidence" cases which govern a prosecutor's production of information in a criminal trial simply do not apply to a post-conviction proceeding in which the Department of Corrections is the defendant/respondent"); Opposition to Petitioner's Motion for Disclosure of Exculpatory Evidence and Discovery in Cardwell v. Angelone, Record No. 951539 (Va.Sup.Ct. 1995) ("Cardwell has cited no authority for extending the rule in Brady to habeas proceedings and respondent has found none"); Response in Opposition to Motion for Disclosure of Favorable Evidence and Statements, Motion for Extension of Time and Motion for Leave to File Amended Petition in Royal v. Netherland, Record No. 960620 (Va.Sup.Ct. 1996) ("The affirmative obligations imposed upon the Commonwealth under Brady simply do not apply to the

post-conviction civil proceeding"). No Virginia court has held otherwise and the petitioners' motions for exculpatory evidence in Cardwell, Royal and Williams were denied by the Virginia Supreme Court.[11]

In the face of an affirmative denial by the Commonwealth as to the existence of exculpatory evidence, no discovery is available. *See*, Lowe v. Commonwealth, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977) (defendant not entitled to discovery absent clear showing that state failed to comply with the trial court's general order to turn over any exculpatory material), *cert. denied*, 435 U.S. 930 (1978). As *this* Court has noted, "'[u]nless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final.'" Pennsylvania v. Richie, 480 U.S. 39, 59 (1987). *Also*, 1997 WL 174144 at *2 (Va.A.G.). As a consequence, Virginia does not even require counsel to demand exculpatory evidence after the Commonwealth Attorney has advised the defense that none exists. *See*, Fitzgerald, 6 Va.App. at 48, 366 S.E.2d at 620-21.

In short, discovery in Virginia is not available to a habeas

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[11] In Cardwell v. Angelone, Record No. 951539 (Va. Sup. Ct. 1995), the accomplice witnesses testified they received no promises or benefits, yet two of them were not prosecuted at all. The most important accomplice witness suggested in his confession that he *had been* promised a benefit for cooperating and he ultimately did enter into a highly beneficial plea agreement. Nevertheless, discovery of exculpatory evidence as to these witnesses was denied and the claim was dismissed. *See*, Motion for Disclosure of Exculpatory Evidence and for Discovery; Order.

petitioner for the purpose of investigating and identifying possible claims. Rather, discovery is available, if at all, only to aid in the proof of claims which have already been pled with sufficient factual specificity to demonstrate the petitioner's entitlement to relief if those facts are proven at an evidentiary hearing. That is all the more true where the evidence which the petitioner seeks would be contained in the files of the prosecutor or the police, especially if the Commonwealth states that all its evidence was disclosed to the defense. The suggestion of the Court of Appeals, therefore, that Strickler could have subpoenaed the police files, when he lacked sufficient information to plead his Brady-related claim fully, and in the face of both the Commonwealth's asserted "open file" at trial and its denials as to the existence of exculpatory evidence during post-conviction proceedings, is entirely inconsistent with Virginia law, public policy and practical experience, and with the often stated position of the Attorney General, on behalf of the Commonwealth.

II. THE FOURTH CIRCUIT'S UNIQUE INTERPRETATION OF BRADY V. MARYLAND AND ITS PROGENY HAS CAUSED ITS "DUE DILIGENCE" EXCEPTION TO SWALLOW THE RULE THAT THE PROSECUTION MUST DISCLOSE EXCULPATORY EVIDENCE.

For the State to violate Brady, it must *suppress* evidence. *See*, Brady, 373 U.S. at 86-90. Absent suppression, there is no violation. Some courts, however, have additionally created a so-called "due diligence" exception to the Brady doctrine, relieving the State of its disclosure obligations where the evidence is otherwise available to the defense.

Only the Court of Appeals for the Fourth Circuit has adopted and applied an interpretation of the so-called "due

diligence" exception to the State's duty to disclose exculpatory evidence which shifts to the defense the burden to discover for itself exculpatory evidence solely in the possession of the State. Some other Courts of Appeals have recognized the exception, but have applied it only where the evidence was actually known by, or was fully available to, the defense, or where the defense actually had all the information needed to produce the evidence itself. *See, e.g.*, Lugo v. Munox, 682 F.2d 7, 9-10 (1st Cir. 1982); United States v. Payne, 63 F.3d 1200, 1208-09 (2nd Cir. 1995); United States v. Perdomo, 929 F.2d 967, 973 (3rd. Cir. 1991); Westley v. Johnson, 83 F.3d 714, 725-26 (5th Cir. 1996); United States v. Todd, 920 F.2d 399, 405 (6th Cir. 1990); United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996); United States v. Davis, 785 F.2d 610, 618 (8th Cir. 1986); United States v. Brown, 562 F.2d 1144, 1151 (9th Cir. 1977); United States v. Valera, 845 F.2d 923, 927-28 (11th Cir. 1988).[12] Indeed, prior

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12 However, two Courts of Appeals, the D.C. and Tenth Circuits, have explicitly rejected the idea of any such "exception." *See*, Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995); United States v. Agurs, 510 F.2d 1249, 1253 (D.C. Cir. 1975)(*citing*, Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966)), *rev'd on other grds*, 427 U.S. 97 (1976), and two others have conceded the logic of the position of those two Circuits, while adopting a highly restrictive rule of "diligence" to avoid blatant "gamesmanship" by defendants. *See*, United States v. Hedgeman, 564 F.2d 763, 768 (7th Cir. 1977); United States v. Shelton, 588 F.2d 1242, 1250 (9th Cir. 1978). *See also* United States v. White, 970 F.2d 328, 337 (7th Cir. 1992)(no duty of disclosure when information is "fully available" to the defense). Thus, in reality, there is little difference in the positions of these two Circuits and those of the D.C. and Tenth Circuits, since, based upon the resulting lack of

to its decision in Hoke v. Netherland, 92 F.3d 1350 (4th Cir.), *cert. denied*, 117 S.Ct. 630 (1996), the Fourth Circuit similarly limited application of this exception. *See, e.g.*, United States v. Kelly, 35 F.3d 929, 933-37 (4th Cir. 1994)(finding violation based, *inter alia*, upon failure to disclose information contained in affidavit which had been placed in court file after start of trial even though Government had alerted defense to relevant areas of inquiry and even provided leads for successful pursuit of information); Barnes v. Thompson, 58 F.3d 971, 975-77 (1995)(holding defense counsel responsible for knowing evidence adduced at the trial of a co-defendant).

As the Fourth Circuit rule has evolved in Hoke and now Strickler,[13] however, the State is excused from disclosing exculpatory evidence if the Court, in retrospect, can hypothesize some means by which the defense could have uncovered the information itself. In the view of the Fourth Circuit, the exception applies whether or not the defense knew the evidence or witnesses existed, what efforts it did make to uncover the evidence, what difficulties the police themselves encountered in discovering the information, or even whether the information was located in places to which the defense had no access. Thus, in Hoke, the Court found no duty to disclose where counsel attempted to uncover the information, but was met with hostility

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materiality, the Tenth Circuit has also held that no constitutional violation occurs where the defense actually has the evidence. *Compare*, Banks, 54 F.3d at 1517 *with* Davis, 785 F.2d at 618 and Brown, 562 F.2d at 1151.

[13] Strickler v. Pruett, 149 F.3d 1170, 1998 WL 340420 (4th Cir. 1998).

and threats, where he did not uncover relevant witnesses, and where the police themselves had difficulty coaxing the truth from the victim's "erstwhile bedmates." 92 F.3d at 1369 (Hall, J., dissenting). Hoke, of course, was followed by the instant case, in which the Fourth Circuit concluded, *sua sponte*, and in direct conflict with the law of Virginia, that privileged information in the possession of the police, the existence of which the Commonwealth had denied, could simply have been subpoenaed during the state habeas proceedings. See, Strickler, 1998 WL 340420 at *8.

The Fourth Circuit has, thus, entirely shifted the burden from the State (to disclose exculpatory evidence) to the defense (to find that evidence itself), regardless of whether the defense actually could have done so. If this does not formally abolish the Brady doctrine, a mere three years after this Court reaffirmed it in Kyles v. Whitley, 115 S.Ct. 1555 (1995), it wounds it fatally. Indeed, it eliminates *any* practical incentive for a prosecutor to disclose evidence which may be harmful to the State's case. A defendant who does manage to discover the evidence himself will have no complaint. However, an aggrieved defendant who does not discover the evidence, once convicted, must not only find the evidence that was suppressed at his trial and demonstrate its materiality, he must also preclude any and all scenarios by which he theoretically could have discovered the evidence himself prior to trial, a burden constrained only by the limits of the Court of Appeals' imagination.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted.

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VIRGINIA CAPITAL CASE CLEARINGHOUSE

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Va.S.Ct. Rule 3A:11:

VIRGINIA SUPREME COURT RULE 3A:11. DISCOVERY AND INSPECTION

(a) Application of Rule. This Rule applies only to prosecution for a felony in a circuit court.

(b) Discovery by the Accused.

(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

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Va.S.Ct. Rule 4:1(b)(5):

VIRGINIA SUPREME COURT RULE 4:1
GENERAL PROVISIONS GOVERNING DISCOVERY

•••

(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

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(5) *Limitations on Discovery in Certain Proceedings.* In any proceeding (1) for separate maintenance, divorce or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus in the nature of coram nobis: (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

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Va. Code Ann. § 2.1-342(B)(1)(Supp. 1998):

VIRGINIA FREEDOM OF INFORMATION ACT

Section 2.1-342. Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter. -- A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian of such records shall take all necessary precautions for their preservation and safekeeping. Any public body covered under the provisions of the is chapter shall make an initial response to citizens requesting records open to inspections within five work days after the receipt of the request by the public body which is the custodian of the requested records. Such citizen requests shall designate the requested records with reasonable specificity. A specific reference to the is chapter by the requesting citizen in his request shall not be necessary to invoke the provisions of this chapter and the time limits for response by the public body. The response by the public body within such five work days shall be one the following responses:

1. The requested records shall be provided to the requesting citizen.

2. If the public body determines that an exemption applies to all of the requested records, it may refuse to release such records and provide to the requesting citizens a written explanations as to why the records are not available with the explanations making g specific reference to the applicable Code sections which make the requested records exempt.

3. I f the public body determines that an exemption applies to a portion of the requested records, it may delete or excise that portion of the records to which an exemption applies,

but shall disclose the remainder of the requested records and provide to the requesting citizen a written explanations as to why these portions of the record are not available to the requesting citizen with the explanation making specific reference to the applicable Code sections which make that portion of the requested records exempt. Any reasonably segregatable portion of an official record shall be provided to any person requesting the record after the deletion of the exempt portion.

4. If the public body determines that it is practically impossible to proved the requested records or to determine whether thy are available within the five-work-day period, the public body shall so inform the requesting citizen and shall have an additional seven work days in which to provide one of the three preceding responses.

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B. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of such photograph will no longer jeopardize the investigation; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher educations as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; records of local police departments relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such departments under a promise of confidentiality; and all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to

the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded for the provisions of this chapter.

Criminal incident information relating to felony offenses shall not be excluded from the provisions of the chapter; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

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